THE ARMY LAWYER

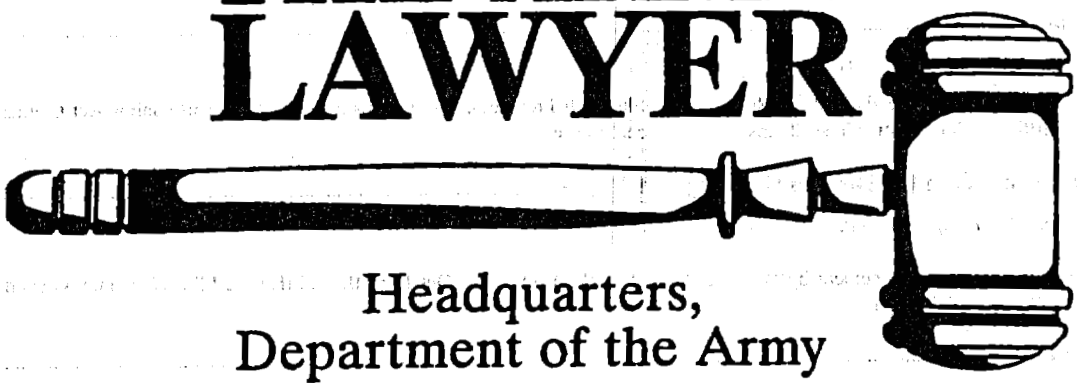

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Table of Contents

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The Uniform Transfers to Minors Act: A Practitioner's Guide

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Introduction

Consider the following scenario: a military officer (Colonel Lee) is doing her own estate planning with her family (a husband and a young son) in mind. Colonel Lee decides to participate in Servicemen's Group Life Insurance (SGLI) at the maximum amount: $200,000 in coverage. She lists her husband as primary beneficiary and her son, by name, as contingent beneficiary. Unfortunately, the Colonel and her husband are subsequently killed in a car accident. Her son is seventeen years old at the time of his parents' death. Because the Office of SGLI will not pay proceeds to a minor, court intervention is required to appoint a guardian of the property (or conservator) to receive the funds. Although one of the boy's aunts (Aunt A) is nominated in Colonel Lee's will as guardian, Aunt A is not a resident of Colonel Lee's domicile, and the court cannot legally appoint Aunt A as guardian. Eventually, after much expense and delay, the probate court appoints Aunt B, a proper resident, as the boy's guardian. By this time, the boy has applied to several colleges and he has been accepted at one of them. He is rapidly approaching the age of majority (eighteen), and Aunt B's attorney informs her that she will have to pay to the boy any unexpended monies in the guardianship when he reaches majority on his eighteenth birthday. He is a nice boy, but immature. She considers using a portion of the money for prepaid college tuition, but is advised that the state law in this area is unsettled. She then decides to ask for court approval of the tuition prepayment. Unfortunately, the boy turns eighteen while court proceedings are pending. The Aunt's attorney advises her that she must release the monies that she is holding and she reluctantly gives the boy a check for $200,000. He then purchases a few things that he always wanted (like a fast car and a big boat), and he decides to postpone college for a year or so. . . .

This nightmarish scenario, and similar problems, could happen to the family of any soldier who does not carefully plan for property transfers for the benefit of his or her children. Estate planning vehicles exist that can mitigate or eliminate the potential for problems like those described above. One of these vehicles is the Uniform Transfer to Minors Act[1]/Uniform Gifts to Minors Act[2] (hereinafter UTMA/UGMA). The UTMA/UGMA presents a unique advantage to the military legal assistance attorney (LAA): relatively uniform application, independent of other state law, regardless of jurisdiction.[3] In contrast, the alternative forms of property transfers for minors (*i.e.*, creation of a trust or use of a guardianship) are tied to specific state laws that vary from jurisdiction to jurisdiction. Given our diverse and mobile client base, LAAs may find it difficult or impossible to advise a particular client on the application of trust or guardianship laws to that particular client's situation. However, the same LAA can become knowledgeable in the provisions of the UTMA/UGMA custodianship, and render competent advice on the application of the custodianship to specific family situations and hypothetical future events.

Purpose of Article

This article is a comprehensive guide to the custodianship created pursuant to the UTMA or its predecessor, the UGMA. This article describes the UTMA/UGMA, examines its provisions and the case law interpreting those provisions, and concludes with a general comparison of the UTMA/UGMA custodianship with alternatives (*e.g.*, trusts and guardianships) in a testamentary transfer situation. The article also contains two appendices. Appendix A contains a discussion of the UTMA/UGMA as a vehicle for inter vivos gifts. Appendix B is a table that indicates, by state, those states that have adopted the UTMA and UGMA and how each state has varied the age of mandatory distribution.

After reading this article, the LAA should be able to advise any military client on whether an UTMA/UGMA custodianship is a reasonable method of testamentary transfers of property for the benefit of a minor. The LAA will be able to assist the client in establishing the custodianship through language in a will or life insurance designation. Most importantly, the LAA will be able to explain to the client exactly how a custodianship works and answer, with some confidence, any "what if" questions that the client might have.

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[1] UNIF. TRANSFERS TO MINORS ACT, 8B U.L.A. 497 (1983) [hereinafter UTMA].

[2] UNIF. GIFTS TO MINORS ACT, 8A U.L.A. 375 (1966) [hereinafter UGMA].

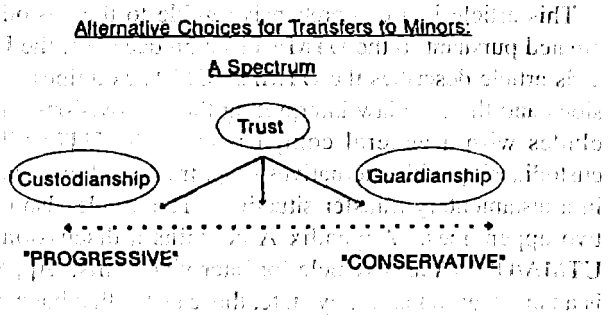
[3] Every state has adopted some variation of the UTMA or UGMA (see Appendix B). The UTMA and UGMA were intentionally designed to operate independently of state laws governing trusts, guardianships, and other fiduciary relationships. *See, e.g.*, UTMA, *supra* note 1, § 12(b). Because the UTMA and UGMA are uniform laws, they have the additional advantage that a state court interpretation in one jurisdiction will be persuasive authority as to the interpretation in other jurisdictions.

Purpose of Property Transfers to Minors

Why might someone wish to transfer property to a minor? For transfers contemplated during the transferor's lifetime (inter vivos transfers), the primary motivation usually is tax savings: possible savings to the transferor on income taxes, gift taxes, and estate taxes. For transfers contemplated on the donor's death (testamentary transfers), the primary motivation usually is to establish controls over money and property to be used for the benefit of the transferor's minor children. Although many LAAs may never advise a client on inter vivos transfers, LAAs *will* be involved in testamentary (*e.g.*, life insurance and will preparation) planning.[4] Hence, this article focuses on the use of custodianships in testamentary planning situations: as repositories for life insurance proceeds or probate assets.

Alternative Forms of Transfer to Minors

Generally, property can be transferred outright to the minor, or some fiduciary can be designated (as either a guardian, a trustee, or an UTMA/UGMA custodian) to hold and manage the property for the minor.[5] As a general matter, guardianships, trusts, and custodianships can be compared by placing them on a spectrum.



On the conservative (right) side of the spectrum are arrangements established with the primary objective of ensuring that the minor's property is not abused or wasted: the fiduciary may be required to post a bond, may be limited in what he or she can do with regard to investments, and may be required to seek periodic court review and approval of the fiduciary's management decisions. On the other end of the spectrum are arrangements, established with the objective of ensuring that the costs of administration are minimized and that investment possibilities are maximized through reduction of court supervision, relaxation of investment restrictions, and elimination of bond requirements. On this spectrum, we can place the guardianship at the right, or "conservative," end: useful where the trustworthiness of the fiduciary may be an issue.[6] We can place the custodianship at the left, or "progressive," end: useful for reducing costs and other administrative requirements when the trustworthiness of the fiduciary is not particularly at issue. Finally, we can place the trust anywhere on this spectrum that we desire, because a trust may be written in either a conservative or progressive manner.

The UTMA/UGMA

What Is the UTMA/UGMA?

The UTMA/UGMA custodianship has been described as a "statutory form of trust or guardianship."[7] Property is transferred to a custodian, who manages the property and associated income for the benefit of the minor. When the minor reaches a certain age, any property remaining in the custodianship is distributed outright to the minor.

The custodianship is a relatively recent creation. In 1955, the New York Stock Exchange sponsored the "Act concerning Gifts of Securities to Minors" (1955 Act). The 1955 Act was created to handle the perceived need for a simple, inexpensive method for inter vivos gifts of securities to minors. Securities dealers were concerned with a particular problem created by outright transfers to minors: that the incapacity of a minor to contract could lead to a minor disaffirming a sale or purchase

[4] DEP'T OF ARMY, REG. 27-3, LEGAL SERVICES: THE ARMY LEGAL ASSISTANCE PROGRAM, para. 3-6b (30 Sept. 1992). Legal assistance attorneys are required to counsel estate planning clients about available SGLI elections. *See* Message, Headquarters, Dep't of Army, DAJA-LA, subject: Legal Assistance on Servicemen's Group Life Insurance Elections (100900Z Dec 92).

[5] For a detailed comparison of guardianships, trusts, and custodianships, *see* William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers*, 27 REAL PROP., PROB., AND TR. J., Spring 1992, at 1, 1-10. Outright gifts to minors are particularly problematic. The minor usually is considered incompetent to deal with the property, and any attempt to sell exchange, mortgage, or lease the property is uncertain until the child attains majority. *See* Ferguson, *Gifts to Minors Can Reduce Estate, But Require Choices*, 50 TAX'N FOR ACCTS. 38, 42 (1993); Cornelius Coghill & Mark B. Edwards, *Transfers to Minors: Basic Techniques*, 4 PROB. & PROP., Jan.-Feb. 1990, at 20. In any event, because no reasonable parent would give valuable property outright to a minor, that option will not be discussed further in this article.

[6] Guardianships of the property, or conservatorships, generally are creatures of the common law as modified by the state. Guardianships can be extremely restrictive and dangerous for the guardian who presumes to spend the minor's money without court approval. As one author recently noted about guardianship law in Connecticut, "It is always a prudent practice for a guardian to get court approval before making expenditures from a minor's estate." Orsini, *Guardian of a Minor's Estate: How Far Can the Guardian Go in Expending the Minor's Money?*, 8 CONN. PROB. L.J. 275, 276 (1994). However, the Uniform Probate Code has varied the common law conservatorship to make it more progressive. In those states that have adopted the Uniform Probate Code, the conservator has legal title (as with a trustee) and some of the common limits on investment and court supervision requirements have been eliminated. UNIF. PROBATE CODE § 5-423(b), 8 U.L.A. 555 (1989) [hereinafter UPC].

[7] UTMA, *supra* note 1 (Prefatory Note).

of a security. Under the 1955 Act, third parties dealing with custodians were protected from capricious minors.[8]

The 1955 Act was followed in 1956 by the UGMA, which included cash as well as securities as types of property that could be transferred into a custodianship. In 1966 the UGMA was revised and amended to increase its usefulness, both with regard to the types of property that could be placed in a custodianship and with regard to the persons or institutions that could serve as custodian. The UGMA was revised and restated in 1983, being renamed the UTMA to reflect that not all transfers possible under the new version were "gifts."[9]

Every state has adopted some version of the UTMA or the UGMA. As of January 1995, forty-three states and the District of Columbia had adopted the more progressive UTMA.[10] Additionally, the few jurisdictions still operating under the UGMA were replacing it with the UTMA at the rate of approximately two states a year.[11] Accordingly, the text of this article will be devoted primarily to the more progressive UTMA, with any significant variation from the UGMA mentioned in the footnotes.

Types of Property That May Be Transferred into a Custodianship

In UTMA jurisdictions, "every conceivable legal or equitable interest in property of any kind, including real estate and tangible or intangible personal property," may be placed in custodianship.[12] There are no upper limits on the dollar value of property that may be transferred into a custodianship.[13]

How to Transfer Property into a Custodianship

Transfer of property into a custodianship is relatively simple. The most common forms of transfer are inter vivos gifts and testamentary transfers.[14]

If ownership in the property is customarily in registered form (*e.g.*, bank accounts, securities, automobiles) or recorded form (*i.e.*, realty), an inter vivos transfer usually is completed by registering (or recording) ownership in the following form: "[Name of Custodian], as custodian for [Name of Minor], under the [Name of Enacting State] Uniform Transfers to Minors Act."[15] If ownership in the property is not customarily in registered form, a written document purporting to transfer the property into a custodianship, signed by both transferor and custodian, is necessary and sufficient to complete an inter vivos transfer.[16] However, for property that is not customarily in registered form, a custodianship only can be established if the transferor and the custodian are different persons.[17]

Once these prerequisites are satisfied, legal title to the property is indefeasibly vested in the minor.[18] Physical transfer of tangible property is not required, nor does the death, incapacity, renunciation, or other ineligibility of the custodian void the

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[8] *Id.* Dealing with property in the name of a minor created difficulties for third parties (*e.g.*, brokers were concerned that a minor could "disaffirm" the sale of a security). Additionally, the formal guardianship was not an adequate substitute because of the expense of setting up the guardianship and the limits on types of transactions (*e.g.*, in some states guardians could not venture into "nonlegal" securities) and requirements for accountings. *Id.*

[9] *Id.* For example, a third party owing a debt to a minor may be required to transfer the money into an UTMA custodianship. *Id.* § 7.

[10] *See* Appendix B.

[11] *See* TJAGSA Practice Note, *Testamentary Transfers Using UGMA or UTMA*, ARMY LAW., Dec. 1993, at 42. Jurisdictions adopting the UTMA have made modifications to the Uniform Law, but these variations from the uniform act tend to be "relatively minor and unimportant." McGovern, *supra* note 5, at 5.

[12] UTMA, *supra* note 1, § 1 cmt.

[13] The UTMA at § 6(c) (Other Transfer by Fiduciary) and § 7(c) (Other Transfer by Fiduciary) mentions $10,000 limits on custodial transfers in certain situations. *Id.* These provisions apply to trustees, creditors, and insurance companies who have some legal obligation to the minor and desire to satisfy that obligation by creating, sua sponte, a custodianship. Neither of these provisions applies to the parent who, desiring to make an inter vivos gift or a testamentary disposition (*i.e.*, by will or life insurance beneficiary designation), *specifically references* the UTMA in the transfer document.

[14] The UTMA allows for other forms of transfer, including an irrevocable exercise of a power of appointment in favor of a minor (UTMA § 4) and sua sponte creation of custodianships by personal representatives (UTMA § 6), trustees (UTMA § 6), and other third parties (UTMA § 7) obligated to a minor.

[15] One also can use words to the same substantive effect. UTMA, *supra* note 1, §§ 3, 9. *See also* Singer v. Brookman, 578 N.E.2d 1 (Ill. App. 1 Dist. 1991) (custodianship under the UTMA or UGMA not created unless transferring document specifically references the Transfers to Minors or Gifts to Minors Act); Hanson v. Hanson, 738 S.W.2d 429 (Mo. 1984) (custodianship under the UGMA not created where account established jointly in names of parent and child).

[16] UTMA, *supra* note 1, § 9(b). Physical delivery of the property in question is not a legal prerequisite to a completed transfer. *Id.* cmt.

[17] *Id.* § 9. If the transferor and the custodian were one and the same, the custodianship could be subject to abuse as the proof of donative intent (the document) is controlled by the transferor. *See id.* cmt.

[18] *Id.* § 11. Once the custodianship is established, neither the transferor nor the custodian cannot divest the minor of the property. For example, retitling the property as Totten trust with the minor as the beneficiary is not permitted. Matter of Estate of McGlaughlin, 483 N.Y.S.2d 943 (N.Y. Sur. 1985). A Totten trust is a payable-on-death account in which the "beneficiary" (*e.g.*, the child) has no rights in the account unless and until the "owner" (*e.g.*, the parent) dies.

transfer into custodianship.[19] If the nominated custodian is unable or unwilling to serve, a successor custodian is appointed as discussed below.

Case law indicates, however, that certain situations require the inter vivos transferor to consider additional precautions when creating the custodianship. If the corpus of the transfer is community property, both husband and wife should agree in writing to the creation of the custodianship. In the absence of this agreement, the transfer may be voidable by the nonassenting spouse.[20] Additionally, if the transferor and the intended custodian are one and the same, the transferor also should specify in writing that the transfer is being made with donative intent.[21] Donative intent is necessary to complete a gift, and without a complete gift certain advantages, such as income tax savings, may not be achieved.[22]

Custodianships also may be established through a testamentary disposition such as a life insurance beneficiary designation[23] or (in most states) a will provision.[24] Contingent interests become custodial property, however, only if the designation is irrevocable. For example, custodians may be nominated to receive property in a will or on a SGLI designation form, but these testamentary designations are revocable at any time prior to the death of the putative transferor.[25] Only at the transferor's death would the designations become irrevocable and actually transfer property ownership into the custodianship. This distinction may be important, because the conflicts

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[19] UTMA, *supra* note 1, § 11. In re Marriage of Stephenson, 209 Cal. Rptr. 383 (Cal. App. 2 Dist. 1984); Lippner v. Epstein, 421 N.Y.S.2d 920 (N.Y.A.D. 2 Dept. 1979).

[20] In re Marriage of Stallworth, 192 Cal. App. 3d 742 (Cal. App. 1 Dist. 1987) (community property cannot be placed in a custodianship without written approval of both husband and wife); In re Marriage of Hopkins, 74 Cal. App. 3d 591 (Cal. App. 2 Dist. 1977) (transfer of community property without consent of spouse may be voidable by spouse); In re McCurdy's Marriage, 489 S.W.2d 712 (Tex. Civ. App. 7 Dist. 1973) (spouse's approval to transfer community property into custodianship was unclear, value of property in custodianship could be considered for purposes of division of property). *But cf.* Voss v. Voss, 1992 WL 120270 (Del. Fam. Ct. 1992) (In this case, the wife acquiesced in her husband's handling of family finances and the husband transferred money into custodial accounts. Because there was no evidence that the husband was intentionally trying to reduce the size of marital estate in anticipation of divorce, the court would not consider custodial property to be marital property subject to division on divorce.); Poe v. Poe, 1994 WL 59418 (Va. App. 1994) (In this case, because there was no evidence of fraud, the appellate court refused to review the trial court's decision that an UGMA custodianship—created two years before a divorce action—was not marital property.); Parker v. Parker, 492 N.W.2d 50 (Neb. App. 1992) (Custodial property is indefeasibly vested and courts will not make it marital property.).

[21] The transferor/custodian might use language such as, "I intend by this writing to indefeasibly invest title to this property in (name of minor)." *See* UTMA, *supra* note 1, § 11(b). At common law, a completed gift required two elements: delivery and donative intent. The UTMA specifically recognizes the problem of proving delivery when the donor and the custodian are the same and there is no written requirement to document the gift. The UTMA does not allow for creation of a custodianship in this circumstance. *See supra* note 17 and accompanying text. However, even when written documentation of the custodianship exists (*e.g.*, the creation of a custodial bank account) some courts have indicated that there may be a problem with the donative intent element when the transferor and custodian are one and the same. Specifically, a few courts have ruled that the mere opening of an account styled as an UGMA account (*see* State v. Keith, 610 N.E.2d 1017 (Ohio App. 9 Dist. 1991); Golden v. Golden, 434 So. 2d 978 (Fla. App. 3 Dist. 1983) (*Golden I*); Heath v. Heath, 493 N.E.2d 97 (Ill. App. 2 Dist. 1986)) or an UTMA account (*see* Golden v. Golden, 500 So. 2d 260 (Fla. App. 3 Dist. 1986) (*Golden II*)) creates only a "rebuttable presumption" of a completed gift. *But cf.* Allen v. Allen, 301 So. 2d 417 (La. App. 2 Cir. 1974) (opening of custodial bank account constituted completed gift). In *Golden I*, the court held that the testimony of the transferor that he had no donative intent was insufficient to overcome the rebuttable presumption. *Accord, Heath*, 493 N.E.2d, at 97. More troublingly, in *Golden II*, a case involving the same father transferor with a different child beneficiary, the court held that a showing of expenditures from the alleged custodial account for child's "education, maintenance, or rehabilitation" could rebut the presumption of donative intent. *Golden II* seems to rely on the proposition that the father is required to provide support to his child, and any putative "gift" which is later used to satisfy an obligation of the giftor is not really a gift at all. However, *Golden 2* undermines the certainty of a custodial gift, and the potential tax advantages of such a gift (see Appendix A), by allowing plaintiffs to use evidence of actions taken months or years after the time of the gift as relevant on the issue of donative intent. In the case, In re Marriage of Agostinelli, 620 N.E. 1215 (Ill. App. 1 Dist. 1993), the court rejected the father/custodian's claim that he lacked donative intent because he had established the accounts for purposes of "tax avoidance." The court noted that the father had told his wife at the time of account creation that the money was for the child's education, that the father made no withdrawals until several years after the account was created, and that the father had filed tax returns for the children recognizing the account interest. If the gift does fail, the account is likely to be considered as a Totten trust—that is, an account actually owned by the putative transferor/custodian which is payable to the minor beneficiary on the putative transferor/custodian's death. *See* Application of Muller, 235 N.Y.S.2d 125 (N.Y. Sup. 1962); In re Miller's Estate, 377 N.Y.S.2d 944 (N.Y. Sur. 1975) (comparing custodianship to Totten trust arrangement). The Totten trust is not a completed gift and does not have any of the advantages associated with inter vivos gifts to minors. *See* discussion in Appendix A.

[22] *See infra* notes 101-05 and accompanying text.

[23] UTMA, *supra* note 1, §§ 3, 7 (see also Appendix B of this article). Both the Office of SGLI and at least one commercial insurance company will accept custodianships created under any state's version of the UGMA/UTMA as proper beneficiary designations. "There are no states for which USAA Life will not accept a custodianship pursuant to that particular state's UGMA/UTMA as a beneficiary designation." Letter from Life Insurance Counsel, USAA Life Insurance Company (Oct. 12, 1993) (original on file with author) [hereinafter USAA Letter]; Message, Headquarters, Dep't of Army, DAJA-LA, subject: Elimination of By-Law Designations Under the Servicemen's Group Life Insurance Program Change, para. I (031000Z Mar 93).

[24] UTMA, *supra* note 1, §§ 3, 5. Although all states allow for creation of custodianships through life insurance beneficiary designations, Michigan, Mississippi, and Vermont still do not allow for custodianships created by will. *See* Appendix B.

[25] 38 U.S.C. § 1970(a) (1991).

of laws provisions in the UTMA are premised on the location of the parties and property as determined at the time of the property transfer.[26]

Custodianships for the benefit of multiple beneficiaries are not permitted.[27] This prohibition may or may not be onerous, depending on whether the transferor desires to divide assets in a predetermined way between beneficiaries or wants the children to receive benefits on an as-needed basis.

Who May Serve as Custodian?

Generally, any person who has attained the age of twenty-one,[28] or a "trust company,"[29] may serve as custodian. Only one custodian is authorized.[30] Nonresidents and foreign citizens may serve as custodians.[31] If the transfer is intended to avoid estate taxes, however, having either the transferor or the spouse of the transferor serving as custodian is inadvisable.[32]

The UTMA has extensive provisions for appointing a successor custodian when a nominated custodian is ineligible, unwilling, or unable to serve.[33] Generally, the transferor has the authority to designate a successor if a successor is needed prior to, or at the time of, the attempted transfer;[34] otherwise, the authority to designate a successor lies in the current custodian or, if that person fails to act, the minor.[35]

Costs of a Custodianship

The UTMA provides little discussion of costs associated with the custodianship. Generally, a custodian is entitled to reimbursement from custodial property for "reasonable compensation" and "reasonable expenses incurred in the performance of the custodian's duties." "Reasonable" charges can be determined by agreement; but, failing agreement, may be established by reference to a state statute or court order. However, under no condition may a transferor who also is the custodian receive compensation.[36]

The Custodian's Responsibilities

As a general matter, the UTMA gives the custodian broad discretion in handling the minor's property. If the custodian avoids a few specific problem areas, the trustworthy custodian need not worry about the possibility of legal liability to the minor or third parties.

Investments

Initially, a custodian is required to take control of custodial property and, if appropriate, register or record the title as custodial property.[37] The custodian may, in his or her discretion, retain any custodial property in the form originally received.

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[26] *See infra* notes 76-84 and accompanying text.

[27] UTMA, *supra* note 1, §§ 10, 12(d).

[28] *Id.* §§ 1, 9. A transferor under the age of 21 may serve as custodian for certain types of property. *Id.*

[29] *Id.* A trust company is a financial institution, corporation, or other legal entity authorized to exercise general trust powers. *Id.* § 1(17).

[30] *Id.* § 10. When the state of Nevada adopted the UTMA, Nevada omitted this section (§ 10) specifically prohibiting the use of "co-custodians." However, the remainder of the UTMA (as adopted in Nevada) makes multiple references to the custodian in the singular (*e.g.*, "the custodian," "an adult," "a trust company"). It is unlikely, therefore, that Nevada intended to create the possibility of multiple persons or entities serving simultaneously as "co-custodians." *See* NEV. RES. STAT. §§ 167.010 to 167.100 (1985).

[31] The UTMA/UGMA does not contain any residency requirements for custodians. In Estate of Mantzouras, 589 N.Y.S.2d 724 (Surrogate's Court, New York County, 1992), testator Mantzouras, a New York domiciliary, died and left a will providing for a substantial bequest to his grandnephew, Elias, a minor living in Greece. The will allowed the executors to make the bequest "to any relative of the minor as custodian for the minor under the applicable Gifts to Minors Act." The executors sought to give the money to Elias's father, a Greek citizen, as custodian; and a guardian-ad-litem appointed by the city challenged this custodianship on the grounds that appointment of an unbonded, nondomiciliary alien would leave no safeguards for Elias's protection. The court held that "absent a specific requirement in the UGMA that a custodian must be a resident or citizen of the United States a nonresident alien may be named custodian." *Id.* at 726. The court rejected application of New York's general statute on fiduciaries (which required appointment of a resident as cofiduciary when a nonresident was named as fiduciary) because "it is clear the draftsmen of the UGMA intended that in most circumstances, a custodian would be appointed and serve without court involvement." *Id.* The ability to designate nonresidents and aliens as custodians is good news for the military attorney, because military clients often have relatives living away from the client's state of domicile. Many clients may want a foreign national, as in *Mantzouras*, designated as fiduciary.

[32] UTMA, *supra* note 1, § 9 (comment).

[33] *Id.* § 18.

[34] *Id.* § 18(a).

[35] *Id.* § 18(b), (c), (d). This section is complex and contains multiple limitations on who can appoint whom as successor custodian.

[36] *Id.* § 15(a), (b). Any custodian may, at his or her option, serve without compensation. *Id.* cmt.

[37] *Id.* § 12(a). Absent a specific court order, a custodian is not required to post a bond. *Id.* § 15(c).

Only if the custodian intends to actively manage the custodial property need the custodian be concerned with the standard of care or other liability issues discussed in this section.[38]

If the custodian begins to actively manage the property, the custodian may invest and manage custodial property with "all the rights, powers, and authority over custodial property that unmarried adults have over their own property."[39] Under the UTMA, the custodian must exercise this authority with the "standard of care that would be observed by a prudent person dealing with the property of another."[40]

Are certain investments too risky, so that the custodian may be liable for any loss of principle? Furthermore, are certain investments too conservative, so that the custodian may be liable for loss of income? Case law[41] helps to illustrate this "prudent person dealing with the property of another" standard.

First, the UTMA standard is a more conservative standard than a "prudent person dealing with one's own property," because a prudent person may take certain risks with his or her own property that a prudent person would not take with someone else's property.[42] The "prudent person dealing with the property of another" standard emphasizes preservation of capital over growth of capital.[43] Therefore, although custodians should not convert custodial property into cash under the mattress, custodians do not have to seek an investment with the highest available yield if they can cite concerns about risk or liquidity.[44] Thus, conservative investments are not a potential source of liability for the custodian.

Investments on the speculative end of the spectrum are another matter. Speculative investments should be avoided. For example, custodians should probably avoid investing in speculative penny stocks.[45] Custodians also should avoid putting custodial assets into speculative business ventures.[46]

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[38] *See id.* § 12(b) cmt. Thus, if the custodianship is created with some risky investment, such as a "penny stock," the custodian need not rush to sell the stocks in an attempt to avoid liability. As long as the original custodial property is properly registered and accounted for, that its value may subsequently go to zero will not give the minor any recourse against the custodian. Section 12(c) also contains limits on investments in life insurance.

[39] *Id.* § 13(a). Although custodians may be granted this broad power to manage property and change the form of property, why would third parties want to deal with a custodian? Third parties might have legitimate concerns about whether the custodian is properly appointed, or whether the property is being managed and expended under the proper custodial standards of care (discussed later). However, the custodianship arrangement is structured so that third parties can "act on the instruction of, or otherwise deal with," anyone holding themselves out to be a legitimate custodian or transferor. Third parties so acting, in "good faith" and in the "absence of knowledge" of a problem with the custodianship, are protected from personal liability to the minor or the minor's representative if that liability is premised on the invalidity of the custodianship or the impropriety of any property transaction. *Id.* § 16. Without a duty to look beyond the custodian's assertions of custodial validity and transactional propriety, third parties are more likely to deal with putative custodians. This, of course, makes the custodian's job easier. Unfortunately, this provision also makes it easier for the negligent or dishonest custodian to waste the custodial property and leave the minor without any decent remedy.

[40] *Id.* § 12(a), (b). The comment to § 12 indicates that this standard was intentionally varied from the UGMA standard of "one who is seeking a reasonable income and preservation of *his* capital." The UTMA standard was redrafted to ensure that courts would apply it as an objective standard. The original UGMA standard, which emphasized how the custodian might deal with his or her own property, was considered by some courts to be subjective. *See, e.g.*, Matter of Levy, 412 N.Y.S.2d 285, 291 (N.Y. Sur. 1978) (custodian is not a fiduciary under New York laws and the UGMA standard of care is so broad that normally courts will not substitute its judgment on expenditures for that of custodian). However, the UTMA standard supersedes the UGMA standard in UGMA states subsequently adopting the UTMA standard (*see* Buder v. Sartore, 774 P.2d 1383 (Colo. 1989)), although two states (Georgia and Illinois) adopted the UTMA but specifically amended it to keep the UGMA standard; *see* 8B U.L.A. 537-38. In any event, a custodian who stays within the bounds set by the UTMA standard will satisfy the standard of care in UGMA jurisdictions. Aside from the standard provided in the UTMA, an UTMA custodian "is not limited by any other statute restricting investments by fiduciaries." UTMA, *supra* note 1, § 12(b). Thus, individual state laws restricting or limiting the investment powers of personal representatives, trustees, or guardians do not apply to the UTMA custodianship, effectively removing the custodianship from state law and making its application more uniform across the various jurisdictions. However, if an UTMA custodian has a special skill or expertise, he or she is expected to use that expertise. *Id.* § 12(c).

[41] The UTMA standard of care mirrors the standard established for fiduciaries in the Uniform Probate Code (UPC), UPC, *supra* note 6, § 7-302, and the case law interpreting the UPC standard may be used to interpret the UTMA standard. UTMA, *supra* note 1, § 12 cmt. Unfortunately, much of the UPC case law is useless when attempting to interpret the UTMA standard. Uniform Probate Code cases involving alleged fiduciary breaches by personal representatives often hinge on the requirement that personal representatives must settle the affairs of an estate and distribute the estate in a short period of time—considerations that do not normally impact the UTMA custodian. Some jurisdictions (*e.g.*, Arizona) use a standard of care for trustees identical to the UTMA standard; cases interpreting the actions of a trustee in these jurisdictions also may be helpful. *See, e.g.*, Shriner's Hosp. for Children v. Gardiner, 733 P.2d 1110, 1111 (Az. 1987) (*see infra* note 48 for a summary of this case).

[42] *See, e.g.*, Estate of Tessier, 468 A.2d 590 (Me. 1983) (interpreting UPC standard of care).

[43] *Buder*, 774 P.2d at 1387.

[44] In Estate of Tessier, 468 A.2d 590 (Me. 1983), the court rejected the plaintiff's contention that failure to move money from bank accounts and treasury notes (then yielding from 6% to 7.5%) to six-month money market certificates (then yielding 11%) was a breach of the fiduciary duty.

[45] *Buder*, 774 P.2d at 1383 (UTMA custodial investment in "blue chip" stocks was acceptable, but not custodial investment in penny stocks).

[46] *See, e.g., Tessier*, 486 A.2d at 590.

A custodian who wishes to invest in speculative or complex investments is well advised to get professional advice,[47] although custodians must make their own decisions based on that advice and not delegate authority to others to make the decisions.[48]

Custodians who actively manage custodial property, however, may pick from a wide variety of acceptable investments. Savings accounts, insured certificates of deposit, treasury notes, bonds (other than junk bonds), and common stocks of highly capitalized companies[49] all would fall in the UTMA investment standard. Additionally, the purchase of mutual funds which invest primarily in the above investments would be acceptable.[50]

Aside from the general standard of care and forms of allowable investment, custodians must be aware of a few other liability pitfalls.

Custodians should be careful to identify their status (*e.g.*, "John Doe as custodian for Jim Doe") on all documents (such as account forms, purchase agreements, contracts) generated during the course of the custodianship. Proper identification of custodial status limits the potential for personal liability in the event of a lawsuit involving an alleged breach of contract or tort.[51]

Certain property should not be commingled. For example, the custodian should not mix custodial property with noncustodial property.[52] Additionally, custodial property maintained for different beneficiaries should not be commingled.[53] Finally, even in cases where the custodian is only handling custodial property for a single beneficiary, the custodian should keep property transferred in different ways (*e.g.*, inter vivos versus testamentary) separate if the age of mandatory distribution varies depending on how the property is transferred.[54]

Custodial property may not be placed in a joint tenancy with right of survivorship,[55] although joint ownership in the form of tenants in common is permissible.[56]

Although the UTMA is silent on the issue of self-dealing, the custodian probably should avoid any transactions that might give the appearance of benefiting the custodian at the expense of the custodial property.[57]

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[47] *See* Estate of Falk, 1991 WL 6380 (Minn. App. 1991) (interpreting UPC standard of care). In *Falk*, a personal representative was found to have breached his fiduciary duty. Under the terms of a land contract, the personal representative had the power to cancel the contract, get the land back, and keep all previous payments as liquidated damages if the debtor defaulted. When the debtor did default, the personal representative settled with the debtor by allowing him to keep one quarter of the land in exchange for returning the rest. The court stated that the personal representative should have investigated the enforceability of the contract, the money needed to enforce the contract, and the recovery that could have been had, prior to settling with the debtor.

[48] *See* Shriner's Hosp. for Children v. Gardiner, 733 P.2d 1110, 1111 (Az. 1987) (interpreting Arizona trustee standard of care identical to UTMA standard of care) In *Shriner's*, a trustee allowed a stockbroker to make independent decisions about purchases and sales of stock. The court held that the trustee's delegation of responsibilities that she could reasonably be expected to perform herself (the purchase and sale decisions) was a breach of the fiduciary duty.

[49] For purposes of trust law, investment in "speculative" stocks can be avoided by purchasing stocks in "established or seasoned" companies and avoiding "newer or smaller" companies. *See* GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 612 (rev. 2d ed. 1980).

[50] UTMA, *supra* note 1, § 12 cmt. However, mutual funds carry some risk for the custodian. First, the custodian may not be able to ascertain exactly what the fund manager is investing in (*e.g.*, as with the recent problem of derivatives in the bond market). Second, if the fund is invested in risky assets and the fund loses money, the custodian could be held liable for letting someone else (*e.g.*, the fund manager) make decisions. *See Shriner's*, 733 P.2d at 1110.

[51] For contract claims, the custodian will not be personally liable on the contract so long as the custodial capacity was identified, either orally or in writing, when entering into the contract. UTMA, *supra* note 1, § 17(b)(1). Additionally, the custodian will not be personally liable on a claim sounding in tort or other claim arising from ownership of custodial property unless the custodian was "personally at fault." *Id.* § 17(b)(2). Likewise, a minor is not personally liable unless personally at fault. Thus, third-party creditors generally are limited to claims against the custodial property. *Id.* (comment).

[52] *Id.* § 12(d). *But see* Matter of Levy, 412 N.Y.S.2d 114 (N.Y. Sur. 1978) (commingling of funds in UGMA jurisdiction will not be punished in absence of bad faith, willful wrongdoing, or gross negligence). In Gray v. United States, 738 F. Supp. 453 (N.D. Ala. 1990), a custodian mingled her own personal funds with custodial assets. The Internal Revenue Service (IRS) taxed the custodian on the income from all the assets in the account, including those assets that were arguably custodial assets. The custodian challenged the assessment, and the court held for the IRS.

[53] UTMA, *supra* note 1, § 12(d).

[54] *Id.* (comment); *see also* Appendix B (for variations in age of distribution by method of transfer). For example, a minor may, on a parent's death, receive custodial assets through both an SGLI designation and through a will provision. Only a minority of states (about fourteen, see Appendix B) set the same mandatory ages of distribution for these two types of transfers. If the custodian is operating under some other state's UTMA, and starts mixing the life insurance proceeds with the probate proceeds—buying and selling assets—the custodian could encounter a significant accounting problem when the minor reaches the first age of distribution.

[55] UTMA, *supra* note 1, § 12 cmt. A custodian may receive property transferred in joint tenancy with right of survivorship and may retain property so transferred, but may not actively convert any property to that form. *Id.*

[56] *Id.* § 12(d).

[57] For example, the general law of trusts, as it has developed in the various states, prohibits a trustee from selling or buying trust property. BOGERT, *supra* note 49, § 543(A). As a general matter, trustees also are prohibited from taking trust property as an offset against debts allegedly owed by the trust beneficiaries to the trustee. *Id.* § 814.

Finally, custodians should not give away property for inadequate consideration,[58] and custodians of tangible property should keep the property in good operation and repair.[59]

Expenditures

The custodian has broad discretion to spend custodial property on behalf of the minor. Specifically, the custodian may spend any monies that the custodian "considers advisable for the use and benefit" of the minor.[60] This "use and benefit" standard includes support and maintenance of the minor, but goes beyond that to include such items as payment of legally enforceable obligations (such as payment of tort claims against the minor or taxes owed by the minor).[61]

Neither the UTMA nor the case law on custodianships provide further insight into the meaning of "considers advisable for the use and benefit." If the custodian can articulate how a particular expenditure benefits the minor, either directly or indirectly,[62] the custodian should be protected from liability. The custodian is probably best advised, however, to avoid using custodial property to make charitable gifts[63] or using custodial property in any way that gives the appearance of self-dealing.[64]

A court may order a custodian to use custodial assets as the court considers advisable for the use and benefit of the minor.[65] Either an "interested person" or a minor who has attained the age of fourteen may petition a court to intervene.[66] The term "interested person" includes the transferor, a parent, a conservator, a guardian, a public agency, or a creditor.[67]

Mandatory Distribution

At some point, custodial property must be distributed outright to the minor. The age of required distribution depends, however, on how the property was transferred. The UTMA provides that property transferred pursuant to an inter vivos gift, an exercise of a power of appointment, by will, or by the terms of a trust, will be distributed to the minor when the minor reaches the age of twenty-one.[68] The age of distribution for other UTMA transfers (such as testamentary transfers through life insurance designation, an employee benefit plan, or a payable on death account) is tied to the age of majority in the enacting state.[69] However, some states enacting UTMA and UGMA have changed the ages of mandatory distribution as originally set forth in the uniform acts. Additionally, several states actually allow the transferor, when establishing the custodianship, discretion to vary the age of distribution within a fixed range of ages. The age of distribution is set by inserting, in the writing creating the custodianship, words to the effect of, "The custodianship is to continue until the age of

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[58] Fogelin v. Nordblom, 521 N.E. 2d 1007 (Mass. 1988) (custodian was grossly negligent and breached fiduciary duty by relinquishing property for inadequate consideration); Hinschberger, By and Through Olson v. Griggs County Social Servs., 499 N.W.2d 876 (N.D. 1993) (conservator breached fiduciary duty by failing to ascertain value of property before renouncing it).

[59] *See, e.g.*, Estate of Baldwin, 442 A.2d 529 (Me. 1982) (interpreting UPC standard of care). In *Baldwin*, a bank appointed as executor violated its fiduciary obligation when it failed to inventory and monitor the ongoing operations of a family business placed in its care.

[60] UTMA, *supra* note 1, § 14(a). The UGMA standard is different: the custodian in an UGMA state may use custodial property "for the support, maintenance, education, and benefit of the minor." UGMA, *supra* note 2, § 4. The UTMA drafters changed this standard to remove any inference that the custodian was limited only to providing the minors' "required support." UTMA, *supra* note 1, § 14 cmt.

[61] UTMA, *supra* note 1, § 7 cmt. If the minor has a child, custodial assets may be used to pay the child support obligation. If the minor is married and then divorces, the spouse has no right of election against custodial assets. *Id.*

[62] The UTMA does not provide guidance on whether and how custodial monies may be paid over to a third party (*e.g.*, a guardian of the person of the minor or a relative of the minor) for the ultimate use of the minor. The law of trusts varies from state to state on whether a trustee, in the absence of specific guidance in the trust, can assume good intentions on the part of a guardian and so pay over the beneficiary's money to that guardian. *See* BOGERT, *supra* note 49, § 814. As a prophylactic matter, the custodian who provides money to a third party probably should provide written guidance to the third party on the use of the funds and demand some sort of accounting (*e.g.*, paid receipts) from the third party.

[63] This action may be interpreted as giving away property for inadequate consideration. *See supra* note 58 and accompanying text.

[64] *See supra* note 57 and accompanying text.

[65] UTMA, *supra* note 1, § 14(b).

[66] *Id.*

[67] *Id.* § 14 cmt.

[68] *Id.* § 20(1).

[69] *Id.* § 20(2).

(fill in the desired age)."[70] The actual requirements of each state are listed, by state and type of custodial property, at Appendix B.

Recourse Against the Custodian

Very few reported cases contain allegations of custodial neglect or abuse.[71] But what if the minor or other interested party is unhappy with the custodian? On proper petition, a court may remove a custodian. A minor who has attained the age of fourteen, the transferor, an adult member of a minor's family, the minor's guardian, or the minor's conservator may petition the court to remove the custodian and appoint a successor custodian, or, alternatively, to have the custodian post a bond.[72]

Courts may require custodians to pay the minor damages for any breach of fiduciary duty that causes a loss of custodial property.[73] The custodian also may be required to pay the minor's attorneys fees.[74]

Choice of Law

Although the UTMA and UGMA are uniform acts, they have been adopted with variations between jurisdictions. Most of these variations are insignificant, but a few variations may be important.[75] With clients who come from state A, are presently in state B, consider themselves domiciliaries of state A, B, or C, and may eventually move to state D, the military attorney needs to understand the choice of law and conflicts of law provisions contained in the UTMA/UGMA.

The transferor designates the state law of choice by reference to that state at the time the custodianship is created. The state selected, however, must have some minimum connections with the UTMA transaction. Specifically, at the time of the transfer, either the transferor, the minor, or the custodian must be a resident of the nominated state, or the custodial property must be located in the nominated state.[76] The state courts in every UTMA state are bound to follow the particular version of the UTMA or UGMA in the state nominated by the transferor.[77] However, if at the time the custodianship is created, insufficient nexus with the selected state exists, the courts of any UTMA state that had sufficient nexus at the time of attempted creation may save the custodianship by applying their version of the UTMA.[78]

What does all this mean for the military attorney advising a client on the creation of a custodianship? Usually, the attorney will be looking for a state that has an UGMA/UTMA that allows for the particular type of transfer[79] and that allows for an older age (either twenty-one or twenty-five) as the age of mandatory distribution. If the soldier is domiciled in such a state, reference the state of domicile in the will or life insurance designation. If the soldier is not domiciled in an appropriate state, consider whether the custodian of choice resides in such a state. For significant amounts of money, selection of

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[70] Most parents probably would want distribution delayed as long as possible, within reason, to ensure that the child has enough maturity to handle the property. Alaska, California, and Nevada currently allow the parent to vary the age of distribution from 18 to 25 years of age. Arkansas, Maine, New Jersey, New York, North Carolina, and Virginia currently allow the parent to vary the age of distribution from 18 to 21 years of age. For the requirements of specific jurisdictions, see Appendix B.

[71] The paucity of court cases in this area might have various explanations. Some custodial abuse probably is never discovered because the property is lost or converted and the minor never learns of the existence of the custodianship. In other cases, the abuse may be discovered, but the minor (or the minor's representative) desires not to upset family harmony and takes no legal action. *See* McGovern, *supra* note 5, at 16. The few reported cases include Buder v. Sartore, 774 P.2d 1383 (Colo. 1989); Matter of Levy, 412 N.Y.S.2d 285 (N.Y. Sur. 1978) (custodian/mother used custodial proceeds to pay back mother's personal loan); Roig v. Roig, 364 S.E.2d 794 (W. Va. 1987) (custodian/mother used custodial proceeds to buy fur coat).

[72] UTMA, *supra* note 1, § 18(f).

[73] *Buder*, 774 P.2d at 1389. Although the UGMA contains a specific provision making the custodian liable (and authorizing the payment of damages) for losses incurred due to bad faith, intentional wrongdoing, gross negligence, or imprudent investing (*see* UGMA, *supra* note 2, § 5), the UTMA does not discuss custodial liability. The *Buder* court reasoned, however, that the minor's right to demand an accounting from the UTMA custodian (UTMA, *supra* note 1, § 19) encompasses the right to sue the custodian for damages.

[74] *Buder*, 774 P.2d at 1386.

[75] For example, the age of mandatory distribution varies from state to state, and a few of the UGMA jurisdictions do not allow for the creation of custodianships by will. *See* Appendix B.

[76] UTMA, *supra* note 1, § 2(a). The UGMA contains no conflicts of law provisions.

[77] *Id.* § 2(c). The UTMA in the state of choice applies even if, after creation of the UTMA, the minor, the property, or the custodian move to another state. *Id.*

[78] *Id.* § 21.

[79] That is, by inter vivos gift, by will, or by life insurance beneficiary designation.

a corporate custodian[80] in such a state would be a viable alternative. If the custodian does not have the proper connections with the state, and an insurance designation is at issue, consider selecting an insurance company located in an appropriate state.[81] Any of these connections would meet the minimum nexus requirements.

In the worst case scenario, the soldier selects a state without the minimum nexus requirements (unlikely, with proper planning) and all of those states that have some minimum nexus to either the soldier, the property, or the custodian are *UGMA* (not *UTMA*) states (an even more unlikely possibility). Because the UGMA, unlike the UTMA, does not have any conflicts provisions, the validity of the custodianship would be uncertain. The courts in these UGMA states probably would follow the intent of the transferor and provide for the creation of a custodianship pursuant to their custodial laws, but it is possible that the custodianship would fail and the property would be transferred into a guardianship.

What happens if property is transferred pursuant to a given state's UGMA, and that state subsequently enacts the UTMA? The UTMA provides guidance on this issue. Property transferred pursuant to a given state's UGMA will be governed by the provisions of that state's UTMA, when, and if, the UTMA is adopted in that jurisdiction. However, the UTMA provisions will not apply where the application of the UTMA would deprive the minor of "constitutionally vested" rights in the UGMA property or would extend the age of distribution applicable under the UGMA.[82]

Testamentary Planning: A Summary Comparison of the UTMA/UGMA with the Alternatives

From the information provided to this point, an LAA should be comfortable in deciding whether the custodianship would work for a particular client and, if so, how to make the custodianship happen. However, even if workable, the custodianship may not be the *best* choice for a particular client. The LAA should be cognizant, therefore, of the two primary alternatives to the custodianship (*i.e.*, trusts and guardianships) and the relative advantages and disadvantages of each. The attorney may want to recommend some alternative to the custodianship (*e.g.*, a trust), even if such a recommendation means referring the clients to another attorney for implementation. Because military clients are much more likely to seek and receive advice on testamentary planning (*i.e.*, wills and life insurance) than inter vivos planning,[83] the comparison of alternatives is made assuming a testamentary disposition and an intent to establish postmortem control mechanisms.[84]

Comparison of Custodianships with Trusts

As discussed in the introduction, a custodianship is a progressive form of property management for the minor. A trust, on the other hand, can be designed by the settlor in a number of different ways—to include provisions that make the trust either a conservative or a progressive transfer vehicle. Despite variations in the form of trusts, trusts and custodianships can be compared in a general fashion and relative advantages and disadvantages ascertained.

Potential Advantages of Custodianships

Testamentary custodianships offer several advantages in comparison with trusts. The primary advantage, particularly for the military attorney, results from the custodianship being a uniform act recognized in all jurisdictions. Once established, the operation of the custodianship under various circumstances is fairly easy to predict regardless of the jurisdiction. Thus, a military attorney can comfortably answer the "what if" questions of a client, whereas the same "what if" questions in the context of a trust may require specific knowledge of a state's trust law. Topics of specific concern might include the execution of the trust, funding of the trust, fiduciary responsibilities, and public policies affecting the interpreta-

[80] The author performed an informal survey of bank trust departments—Jefferson National, Crestar, and Central Fidelity—in Charlottesville, Virginia (the Virginia version of UTMA has a mandatory age of distribution up to age 21). All three banks indicated that they would accept a nomination as an UTMA custodian, if the amount of custodial property was sufficient. One bank indicated that, to make the custodianships economically viable, a minimum of $75,000 per beneficiary would be necessary to fund the custodianships. That same bank quoted an annual administration fee of .2% of assets (which they indicated was lower than their trust administration fee for similar amounts of assets). If a soldier wants to nominate a corporate custodian for a testamentary custodianship, advise the soldier to contact the bank to ensure that it accepts such custodial responsibilities. The bank probably will want a letter informing the bank of the nomination and containing any guidance on the use of the funds (*e.g.*, primarily to fund college education) that the soldier might have. This letter is not a legal requirement and not legally binding on the bank. However, the letter will help the bank when the soldier dies, the insurance claim forms have to be filed, and the bank, ultimately, is considering how to spend the money for the "use and benefit" of the minor.

[81] Unfortunately, the Office of SGLI is located in New Jersey, a state that currently uses the age of majority (18) for the age of distribution in custodianships created by insurance. *See* Appendix B.

[82] UTMA, *supra* note 1, § 22 cmt. However, property received under the UGMA should not be commingled with property received under the UTMA. *See* Thomas E. Allison, *The Uniform Transfers to Minors Act—New and Improved, But Shortcomings Still Exist*, 10 U. ARK. LITTLE ROCK L.J. 339, 360 n.150 (1988).

[83] *See supra* note 4 and accompanying text.

[84] All transfers to minors can be divided into two different categories: testamentary transfers and inter vivos transfers. The primary purpose of testamentary transfers is usually to establish control mechanisms that ensure minors are properly cared for after the death(s) of their parent(s). The primary purpose of most inter vivos transfers to minors is the potential for property conservation through tax savings: savings on income taxes, gift taxes, and estate taxes. *See* Appendix A for further discussion of inter vivos transfers.

tion and administration of the trust. Some additional advantages of the custodianship follow.

A custodianship can be established informally and usually with just a few written words. A trust document, on the other hand, may be several pages long and may require certain formalities in its execution.

Any nonresident may be selected to serve as a custodian. State fiduciary law varies, however, on whether, and under what circumstances, a nonresident can be named as a trustee. Income taxes are a relatively simple proposition for a custodianship. All income on custodial property is immediately taxable to the minor, whether or not the custodian distributes or otherwise expends the income during the year the income is received. On the other hand, the trust is a separate taxable entity that must prepare separate tax forms for income that is not distributed by the trust in the year received.[85]

Finally, when a custodianship is designated as a life insurance beneficiary, payment to the custodian should be made immediately after death without any court intervention. However, the same life insurance company may not pay immediately on a trust designation.[86]

Potential Advantages of Trusts

However, the custodianship may not be the best vehicle for every testamentary distribution to a minor. The trust option offers some potential advantages over a custodianship.

The mandatory age of distribution of custodial assets varies depending on the state and type of transfer, but usually is eighteen or twenty-one.[87] If the assets are significant, many transferors will want to avoid the possibility of an irresponsible young adult wasting the funds, or, even worse, relying on the funds to the detriment of career development.[88] A trust allows the settlor great flexibility to designate the age of distribution.[89]

The trust option offers the settlor more flexibility than the custodianship in other matters. For example, the settlor may designate specifically what the trustee can (and cannot) do with the assets as far as investments and expenditures. Although the transferor in a custodial situation informally can advise the custodian on the transferor's desires, these desires cannot be legally enforced.

Another potential advantage of the trust option is the ability to establish one trust for multiple beneficiaries. In contrast, a single custodianship cannot be used for the benefit of multiple minors. If more than one minor is involved, a separate custodianship must be established for each. The funds available for transfer must be split between the custodianships, and, hence, between the minors. Therefore, even if the same person is designated as custodian for all the minors, the custodian does not have discretion to use one minor's funds for another minor. This limitation may be undesirable where the transferor wants the fiduciary to use the money for a group of children on an "as needed basis," but the limitation might be acceptable if the transferor does not want one child (*e.g.*, a special needs child) to use up all the funds available to the children.

A trust may include a spendthrift provision,[90] while the custodial acts contain no spendthrift protections. The absence of

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[85] Until recently, the trust could be used as an income tax saving device by splitting income between the trust and the minor. However, the recent increase in trust income tax rates virtually eliminated this advantage. For example, in 1995, only the first $1550 in trust income is taxable at the lowest rate (15%). Trust income above $1550 is taxed at marginal rates of 28-39%. *See* FEDERAL TAX HANDBOOK, para. 1106 (Research Institute of America, 1994) [hereinafter FEDERAL TAX HANDBOOK]. Also, perhaps in part because a custodianship is not a separate taxpaying entity, a bank trust department may charge lower administration fees for custodianships than trusts. *See supra* note 80 (discussion on corporate custodians).

[86] Payment of life insurance proceeds payable to, or on behalf of, a minor generally will be delayed pending court intervention. For example, when a minor is named outright as the insurance beneficiary the insurance company (including OSGLI) will, generally, pay only the court-appointed conservator; and when a testamentary trust is named as the designated beneficiary the insurance company generally will require court approval of the trust document. Only when an inter vivos trust or a custodianship is designated as the insurance beneficiary will the insurance company pay without court intervention. *See* DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE, para. 11-30e(1)(a), g(1)(a) (20 Oct. 1994) (OSGLI does not require court intervention for inter vivos trusts or custodianships); USAA Letter, *supra* note 23 (USAA generally will pay on an inter vivos trust or a custodianship designation within three business days of receiving certified death certificate).

[87] *See* chart at Appendix B.

[88] A trust is the only option that keeps the property out of the hands of the beneficiary for as long as the settlor may desire.

[89] The problem of premature distribution, however, can be mitigated even in a custodianship. For example, the transferor can invoke the custodial act of a state that has a later age of mandatory distribution; to include a few states that allow for mandatory distribution as late as the age of 25. *See* chart at Appendix B. The choice of law rules provide the transferor with significant leeway in selecting the applicable state. *See supra* notes 76-82 and accompanying text. Additionally, the transferor could limit the dollar amount of assets in the custodianship and indicate to the custodian that the intended purpose of the transfer is to care for the minor prior to the age of distribution. The funds should be used by the custodian for expenses such as college tuition and the amounts remaining at the age of distribution would not then be too significant.

[90] A "spendthrift" provision operates to bar creditors of the beneficiary from access to the principal and income of the trust. The spendthrift provision prevents the beneficiary, prior to distribution of trust property, from assigning or pledging the trust property as collateral. Most states recognize and enforce spendthrift trusts. *See* BLACK'S LAW DICTIONARY 1256 (5th ed. 1979).

spendthrift provisions in the UTMA raises a concern that a beneficiary might use custodial property as collateral, or that a beneficiary might incur debts and a judgment creditor might attempt to enforce the debts against custodial assets.[91] For beneficiaries who have not reached the age of majority, the absence of spendthrift provisions should not be of much concern. Third parties transact business with these parties at their own risk: except for torts or the cost of necessaries, the minor has the power to disaffirm any transactions.[92] The more serious problem involves beneficiaries who have achieved majority but have yet to reach the age of mandatory property distribution. Hopefully, parents will have some idea of whether their children are likely to become spendthrift problems. If they are, and significant assets are to be transferred, the custodianship may not be an appropriate vehicle.[93]

Comparison of Custodianships with Guardianships

Another alternative for transfer to minors is the guardianship of the minor's property, or conservatorship.

Potential Advantages of Custodianships

In general, when comparing the custodianship with the guardianship, the custodianship presents many of the same advantages that it has over the trust. For example, the law of guardianship is state specific and is difficult for the military attorney to research and advise on: a nonresident may not be able to serve as guardian; insurance proceeds will not be payable to a guardian without court intervention.

The custodianship has additional advantages over guardianships. The custodianship offers the possibility of flexibility in the age of mandatory distribution, while the guardianship offers no flexibility. The guardianship will terminate when the minor reaches the age of majority (eighteen in almost every state). The minor is then likely to receive the distribution of remaining assets from the guardian at an age when the minor still is probably too immature to safeguard the assets.

Unlike a guardian, a custodian will not have to post bond or endure periodic accountings by a court. Therefore, the custodian's job is easier than that of a guardian and the expenses associated with a guardianship (*i.e.*, costs for bond premiums, attorney's fees, court filing costs) are either reduced or eliminated.

The custodian also has flexibility, in both investments and distribution of property, that a guardian may not have. Guardians may be advised to seek court approval for any significant expenditure or investment decision.

Custodians have all the rights to handle property that unmarried adults have with their own property, and good-faith third parties can rely on the custodian's assertions of the validity of the custodianship and proper use of the custodial property. However, guardians do not usually acquire title to the ward's property, and the acts of guardians, if without authority, may be voidable at the expense of third parties. Thus, third parties may be reluctant to deal with guardians.[94]

Potential Advantages of Guardianships

Guardianships are structured primarily with the concept of asset protection in mind. The requirement to post bond, the limits on the guardian's ability to expend and invest assets, and the close court supervision ensure that the guardian will not, through misconduct or neglect, waste the minor's assets. The custodianship does not contain any significant oversight checks on the custodian and if the fiduciary is potentially incompetent or dishonest, then a guardianship would appear to be a preferred vehicle. After all, if there is no property to expend or invest, the above listed advantages in a custodianship become meaningless.

The possibility of waste or abuse in a custodianship situation can, however, be mitigated. The mitigation is accomplished primarily through careful consideration of who (or what) should serve as custodian. The transferor should be able to find someone (usually, a relative) who is both trustworthy and financially competent. If the transferor is contemplating nominating someone who is trustworthy, but not particularly knowledgeable about financial management, that person still may be able to serve effectively as custodian if they seek financial advice from professionals—something that the transferor could instruct on in a separate writing. Finally, a corporate fiduciary always remains a possibility when considering a custodianship. As custodian, a bank can provide expert financial management skills for minimal cost,[95] and the

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[91] UTMA, *supra* note 1, § 17 cmt. recognizes that custodial assets may be used to pay any legal obligation of the beneficiary and that the assets may be reached by creditors.

[92] RESTATEMENT (SECOND) OF CONTRACTS § 14, cmt. b (1981).

[93] Does a transferor or custodian have any duty to tell a beneficiary about the existence of the custodianship or custodial property? The UTMA and UGMA do not specifically mention this type of a duty, and no reported cases on this issue exist. The UTMA provides, "A custodian shall . . . make (tax records) available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has reached the age of 14 years." UTMA, *supra* note 1, § 12(e). In any event, the custodian would find it difficult to conceal the existence of a custodianship from a beneficiary who has reached the age of majority, because any custodial income must be reported on the beneficiaries' tax return and so, by implication, the information would have to be provided to the beneficiary.

[94] McGovern, *supra* note 5, at 3, (citing 36 WIS. B. BULL., Feb. 1963; RESTATEMENT 2D OF TRUSTS § 7 cmt. a (1959)).

[95] *See supra* note 82 and accompanying text.

bank's deep pockets reduce or eliminate the need for the protections inherent in the guardianship.[96]

Conclusion

Let us return to our initial scenario: a military officer (Colonel Lee) is conducting estate planning with her family (a husband and a young son) in mind. Colonel Lee decides to participate in the SGLI at the maximum amount: $200,000 in coverage. She wants to list her husband as primary beneficiary and her son, by name, as contingent beneficiary.

Fortunately, Colonel Lee goes to the legal assistance office for advice on the SGLI designations. The LAA explains the various options, along with their pros and cons, that Colonel Lee may use to protect her son. The LAA is not familiar with the particular trust and guardianship laws of Colonel Lee's domicile, but feels comfortable with the UTMA and recommends it as appropriate in Colonel Lee's case. However, Colonel Lee lives in state X, and the UTMA as adopted in that state has a mandatory age of distribution of eighteen for life insurance custodianships. However, Aunt A lives in state Y, and the LAA notes that the UTMA age of distribution in state Y is twenty-one. With a few strokes of the typewriter, the SGLI form is completed: the contingent beneficiary is Aunt A, as custodian under the UTMA of state Y, for the benefit of the child.

Unfortunately, Colonel Lee and her husband are subsequently killed in a car accident. Her son is seventeen years old at the time. The Office of SGLI immediately pays the UTMA custodian. That Aunt A is not a resident of the Lee's domicile is irrelevant as far as the Office of SGLI is concerned. There are no extensive court proceedings, no delays, no court costs, no bond, and no residency requirements. The boy's eighteenth birthday—the age of majority—is fast approaching—but there is no need to rush any custodial spending decisions because the custodianship extends for an additional three years beyond his majority. On his eighteenth birthday the boy receives a dictionary and a thesaurus (in lieu of a fast car and a boat). The boy then enters college, the custodian pays the tuition, and the boy goes on to be a scholar and a gentleman.

APPENDIX A

The UTMA/UGMA and Inter Vivos Transfers

The article focused on the use of the UTMA/UGMA custodianship as a vehicle for testamentary transfers. However, some LAAs may find themselves providing advice on inter vivos, or lifetime, gifts of property to children. This Appendix addresses some of the issues surrounding the use of the custodianship as a vehicle for inter vivos transfers.[97]

The primary motivation for most inter vivos transfers of valuable property from parent to child is tax savings.[98] Specifically, gifts to minors may reduce the rate at which income generated by the property is taxed[99] and may reduce the size of the donor's estate for purposes of estate taxes.[100]

Most military families are probably not in a position to obtain, or even need, these potential tax savings. First, many families are not currently paying income tax at high marginal rates, and so transfer of assets to a child would not provide significant income tax relief. Second, many military families will not have sufficient assets (*e.g.*, $600,000 or more)[101] to subject the estate to any federal estate tax, so that inter vivos transfer of assets to a child would provide any benefit in the form of estate tax relief. Finally, many military families do not have assets that they can afford to tie up in a child's name.

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[96] If an individual custodian wastes or abuses custodial assets, the individual custodian may not have any significant assets of his or her own and so may be judgment proof. The bank, on the other hand, could be forced to make good on the waste or abuse of one of its trust officers.

[97] The focus is on the parent as donor, although some of the discussion also applies to other adults as donors.

[98] *See* Atkinson, *Gifts to Minors: A Road Map*, 42 ARK. L. REV. 567, 568 (1989). Another possible reason to transfer property to minors is to disinherit a spouse, and the custodianship may have some value here. However, in some community property states, the transferor will find it difficult to convert community property into custodial property (*See supra* note 20 and accompanying text). In noncommunity property states, the transferor may attempt to convert his or her property into custodial property and thus reduce the size of the estate available for the spousal right of election. In many states, however, the spouse now may elect against an "augmented" estate which generally includes property transferred without consideration within a certain number of years of death. *See, e.g.*, UPC, *supra* note 6, § 2-202(1)(iv) (covers transfers made within two years of death). *But cf.* In Re Zeigher's Estate, 406 N.Y.S.2d 977 (Nassau Sur. 1978) (surviving spouse could not reach property transferred into a custodianship because this property was not part of the defined New York augmented estate); In Re Estate of Schwartz, 295 A.2d 600 (Pa. 1977) (same result, under Pennsylvania law, as *Zeigher*).

[99] *See* UTMA, *supra* note 1, §§ 1 cmt., 9 cmt. For example, using the 1995 tax laws, property held by a married parent would generate income taxed at a 28% rate (assuming the total taxable income of the parent rests between $39,000 and $94,250). FEDERAL TAX HANDBOOK, *supra* note 85, para. 1103. The same property, transferred to a child age 14 or older, would generate income up to $650 that is not taxable (because of the child's standard deduction), and income in from $650 to $22,100 would be taxed at only a 15% rate. For children under 14, however, this tax shelter is limited to a total of only $1300 in income, after which additional income is taxed at the parent's marginal rate. *Id.* paras. 1102, 3134-36.

[100] Donors may transfer up to $10,000 a year, per donee, without incurring any gift tax liability. I.R.C. § 2503(b). The ultimate estate tax savings on the value of the property transferred may be amplified if the property transferred generates significant income, or appreciates rapidly in value, between the time of transfer and the donor's death. Atkinson, *supra* note 98, at 569-72.

[101] The unified credit against federal estate taxes is currently $192,800. I.R.C. § 2010(a). "The effect (of the unified credit) is to exempt up to $600,000 from estate taxation." FEDERAL TAX HANDBOOK, *supra* note 85, para. 5028.

However, some families will meet these particular threshold requirements. For these families, the usefulness of the custodianship as a tax saving inter vivos gifting device may depend on the ultimate use for which the donor (parent or grandparent) intends the property. That is, does the parent intend that the property be conserved for ultimate distribution to the minor when the minor reaches the age of distribution? Or does the parent intend that the property be expended during the course of the custodianship?

If the donor views the gift primarily as property to be conserved during the term of the custodianship—for the property to be distributed in a lump sum when the minor reaches age eighteen or twenty-one—the custodianship works well. Transfers made pursuant to the UGMA/UTMA are indefeasibly vested in the minor. Income generated by the custodial assets is taxable to the child, not the parents. Property transferred into a custodianship is considered a completed gift which qualifies for the annual $10,000 gift tax exclusion. Finally, the property transferred is removed from the parent's gross taxable estate, so long as the parents also do not serve as custodians.[102] Thus, for inter vivos gifts, a relative or corporate fiduciary should probably serve as custodian.

More commonly, however, the parents want to use the custodianship as a college fund—to use all, or at least a significant part, of the custodial property to pay for college expenses. Because forty-two states allow for creation of a inter vivos custodianship which will terminate when the minor reaches age twenty-one (or later),[103] the custodianship also would appear to be ideally suited to the college funding task.

The use of custodial assets to fund college expenses, however, raises some troubling issues. Two issues are of particular concern: Does the parent's obligation to support the child under state law include providing a college education? And will the transfer of property from the parent into the custodianship undercut the parents' ability to qualify for state and federal financial aid?

If, as part of a parent's obligation to support his or her child, state law requires that the parent pay for all or part of a child's education, then the use of custodial funds to pay for a child's college expenses creates two related dangers for the parents. First, a minor is not legally required to use his or her funds to fulfill the support obligation of the parents, so the parent custodian's use of custodial funds (which belong to the minor) may be a breach of the fiduciary duty of the custodian and ultimately result in a lawsuit against the custodian.[104] Additionally, the IRS may view any amounts expended out of a custodianship in fulfillment of a legal support obligation of a parent as income to the parent.[105] If custodial property spent on college costs is taxed to the parent as income, the custodianship will be transformed from a tax saving device to a tax trap for the parent.

Whether or not the payment of college expenses is a parental support responsibility depends on state law, and the answer varies from state to state. Two conflicting trends impact the development of the law in this area: the reduction in the age of majority from twenty-one to eighteen in most jurisdictions; and the growing realization of the importance of a college education for children.[106] Generally, state laws can

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[102] The IRS takes the position that a donor/custodian has sufficient interest in custodial property to include that property in the donor custodians estate under I.R.C. §§ 2036 and 2038. *See* UTMA, *supra* note 1, § 9 cmt. (citing various Revenue Rulings and Estate of Prudowsky v. Commissioner, 55 T.C. 890, *aff'd per curiam*, 465 F.2d 62 (7th Cir. 1972)). The UTMA (§ 20(3)) also provides that, in the event of the minor's death, custodial property becomes part of the minor's estate. The intestate laws of the various states provide that parents are the primary takers of children's estates. Even parents who create a custodianship to remove property from their estate and appoint a third party custodian will find the property back in their estate if the minor dies before the parent donor. *See* McGovern, *supra* note 5, at 12.

[103] *See* Appendix B.

[104] *See, e.g.*, Weisbaum v. Wiesbaum, 477 A.2d 690 (Conn. App. Ct. 1984) (trial court erred in allowing father to invade custodial funds to alleviate his support obligations); Erdmann v. Erdmann, 226 N.W.2d 439 (Wis. 1975) (custodian/father could not use children's investment fund to make child support without court approval); Wolfert v. Wolfert, 598 P.2d 524 (Colo. Ct. App. 1979) (trial court did not err in refusing to allow husband to use the UGMA account to reduce court-ordered child support).

[105] The IRS is concerned when property that belongs to a minor, in custodianship or other form, generates income that is used for the minor's support. If some adult, usually a parent, has a "legal obligation" to support a minor, then, in the normal course of events, that adult must generate income to support the child and the income is taxed at the adult's rate before being used to satisfy the adult's support obligation. However, if the adult can put income-producing property in the child's name, and generate income that is taxed at the child's rate (usually lower than the adult rate), the IRS will receive less in taxes. Additionally, because the adult needs less current income, the adult may structure some of his remaining assets into tax-free or tax-deferred vehicles and thus further reduce the total taxes payable to the IRS. These possibilities do not please the IRS. So, to the extent that custodial income is used to replace some adult's "legal obligation" of support, that income is not taxed to the child, but to the adult. Rev. Rul. 56-484, C.B. 1956-2, 23. Some states may reduce or eliminate the parental obligation of support when a child has sufficient assets to care for himself. Unfortunately, the UTMA is specifically written so that it will not affect an adult's "legal obligation" to provide support under state law. UTMA, *supra* note 1, § 14(c), comment.

[106] "It would be extraordinary in these days to maintain that a college education is not a 'necessary.' It is necessary both from the child's and society's point of view that every child receive all the education he is able to receive." I HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 365 (1987, West Publishing).

be divided into two camps. Only a minority of states either terminate all parental support obligations at the age of majority (eighteen) or explicitly refuse to recognize college as a parental support requirement.[107] The more common rule, however, is to include college as a potential parental obligation past the age of majority.[108] In determining whether the parent has an obligation and how much support the parent is expected to provide, cases decided in these jurisdictions considered the following factors: the parents' ability to pay, the child's assets, and the child's academic ability. Parents who live in one of these latter states, and who may have significant parental assets when the child reaches college age, may need to do more research before using UTMA (or some other vehicle) to transfer the college nest egg into the children's names.

Another factor that parents should consider before transferring college funds to the children is the availability of federal and state tuition assistance. Certain financial assistance is based on need, and the government and "most" schools use a formula that takes into account the parents' income, the parents' assets, and the childs' assets.[109] Both students and parents are expected to use up a certain percentage of their assets each year toward college costs, with financial aid available only to make up the difference. The formula requires students to use as much as thirty-five percent of their assets each year, while parents must generally pay only 5.6% of their assets.[110] If the college money is transferred to the child (in a custodianship or otherwise), the available aid in any given year is reduced by both thirty-five percent of the college money *and* an additional 5.6% of the parent's own assets. If the college money remains in the name of the parent, however, the students' portion of the aid reduction formula (thirty-five percent of students' assets) probably will be minuscule, and the available financial aid will increase correspondingly.

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[107] *Id.* at 364 (citing the District of Columbia and Florida as jurisdictions that do not consider a college education a "necessary" that implicates a parental support obligation). California and Texas also refuse to extend support obligations beyond the age of 18. *See* CAL FAM. CODE § 3901 (West 1994); Jones v. Jones, 225 Cal. Rptr. 95 (Ct. App. 2d Dist. 1986) (child could not compel father to pay for college education when child was past age of 18); TEXAS FAM. CODE ANN. § 14.05(a) (West 1986); Ewing v. Holt, 835 S.W.2d 274 (Tex. Ct. App. 1992) (parent's support obligation to minor beyond majority (age 18) extends only to completion of secondary education). In Pennsylvania, *married* parents do not have any support obligations past age 18, but *divorced* parents might. *See* Pennsylvania College Expenses Act, 23 PA. CONS. STAT. ANN. § 4327 (1993). A similar distinction between the support obligations of married and divorced parents exists in Alabama. *See* B.A. v. Alabama Dep't of Human Resources ex rel. R.A., Ct. Civ. App., No. AV92000784 (1994).

[108] CLARK, *supra* note 106, at 364-65. Clark cites cases from Colorado, Mississippi, New York, Pennsylvania, Missouri, New Jersey, Illinois, Indiana, Alabama, Georgia, Michigan, Oklahoma, South Carolina, Iowa, and Connecticut. Some of these states (*e.g.*, New Jersey) may require that the parent pay for graduate school in addition to undergraduate schooling; while other states (*e.g.*, New York (Romansoff v. Romansoff, 562 N.Y.S.2d 523 (N.Y. App. Div. 1990)) may require college education support only until the minor reaches the age of 21.

[109] *How Pros Invest for Their Kids*, MONEY MAGAZINE, Apr. 1994, at 125. Generally, parents whose combined income is $80,000 to $100,000 (or less) may be able to qualify for some financial aid. *Id.*

[110] *Id.*

APPENDIX B

UTMA/UGMA

Version of Act and Age of Distribution[111]
Summary by Jurisdiction
January 1995

State	*UTMA*	*UGMA*	*Age of Distribution to Minor For Transfers*		
			By Will	*By Life Insurance*[112]	*By Gift*[113]
Alabama	X		21	Age of Majority	21
Alaska	X		18–25[114]	18	18–25[115]
Arizona	X		21	18	21
Arkansas	X		18–21[116]	18	18–21[117]
California	X		18–25[118]	18–25[119]	18–25[120]
Colorado	X		21	21	21
Connecticut		X	21[121]	21	21
Delaware	X		21	Majority	21
District of Columbia	X		18	18	18
Florida	X		21	18	21
Georgia	X		21	Majority	21
Hawaii	X		21	18	21
Idaho	X		21	18	21
Illinois	X		21	18	21
Indiana	X		21	21	21
Iowa	X		21	21	21
Kansas	X		21	18	21
Kentucky	X		18	18	18
Louisiana[122]	X		18	18	18
Maine	X		18–21[123]	Majority	18–21[124]
Maryland	X		21	18	21
Massachusetts	X		21	21	21
Michigan[125]		X	Not Avail.	Majority	18
Minnesota	X		21	18	21
Mississippi[126]	X		21	18	21
Missouri	X		21	Majority	21
Montana	X		21	18	21
Nebraska	X		21	Majority	21
Nevada	X		18–25[127]	18–25[128]	18–21[129]
New Hampshire	X		21	18	21
New Jersey	X	X	18–21[130]	Majority	18–21[131]
New Mexico	X		21	Majority	21
New York		X	18–21[132]	18–21[133]	18–21[134]
North Carolina	X		18–21[135]	18	18–21[136]
North Dakota	X		21	18	21
Ohio	X		21	Majority	21
Oklahoma	X		18	Majority	18
Oregon	X		21	18	21
Pennsylvania[137]	X		21	Majority	21
Rhode Island	X		18	18	18
South Carolina[138]		X	18	18	18
South Dakota	X		18	18	18
Tennessee[139]	X		21	21	21
Texas[140]		X	18	18	18
Utah	X		21	Majority	21
Vermont[141]		X	Not Avail.	Majority	Majority
Virginia	X		18 or 21[142]	18	18 or 21[143]
Washington	X		21	Majority	21
West Virginia	X		21	Majority	21
Wisconsin	X		21	18	21
Wyoming	X		21	Majority	21
Puerto Rico	*Not Enacted*				
Virgin Islands[144]		X	Not Avail.	Not Avail.	21

FOOTNOTES FOR APPENDIX B

[111] This appendix lists the mandatory age at which the custodian must distribute custodial property to the minor. Information without specific citations was obtained from UTMA, *supra* note 1. Additionally:

(1) If a particular age (*e.g.*, "18") is given below, that age is specifically listed in the adopting state's version of UTMA/UGMA.

(2) The word "majority" indicates that the adopting state's UTMA/UGMA references the state's laws of majority as establishing the age of distribution. In most states, the age of majority is currently 18.

(3) If the minor dies before the referenced age of distribution, all states require the custodial property to be distributed to the minor's estate.

(4) A transfer made pursuant to the UGMA generally will be terminated at the age specified under the named jurisdiction's UGMA, even if that jurisdiction later adopts the UTMA with different ages of distribution. UTMA, *supra* note 1, § 22c (comment). So, for example, if a transferor makes a lifetime transfer under South Carolina's UGMA (age of distribution 18), and South Carolina later adopts the UTMA (age of distribution 21), the proceeds still will be distributed when the minor reaches age 18.

[112] This column provides the age of distribution for transfers made pursuant to a designation of a custodian as beneficiary of a life insurance policy where the insured maintains ownership of the policy (*e.g.*, SGLI). If the ownership of the life insurance policy is transferred to the custodian during the life of the transferor, then the policy is a completed gift and the age of distribution is as set forth under the "By Gift" column. If a minor is designated as an outright beneficiary under the policy and the life insurance company wishes unilaterally to establish a custodianship to receive the proceeds, the age of distribution is, generally, as set forth in the "By Life Insurance" column (in Massachusetts, however, the age of distribution would be 18).

[113] Inter vivos, or lifetime, gift.

[114] The transfer will be made when the minor reaches the age of 21, unless the will substitutes the words " as custodian for _____ until _____" for the words "as custodian for _____." The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. ALASKA STAT. §§ 1346.190, 1346.195 (1990).

[115] The transfer will be made when the minor reaches the age of 21, unless the transferring document substitutes the words " as custodian for _____ until _____" for the words "as custodian for _____." The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. *Id.* Alaska also provides that the transferor of a lifetime gift may allow the beneficiary to force distribution of the property after the beneficiary's twenty-first birthday by including the following language in the transferring document: "subject to the minor's right to compel immediate distribution of the property by giving written notice to the custodian during the six month period beginning on the minor's 21st birthday. . . ." *Id.* § 1346.195(c). This option is provided for the transferor to ensure that IRC 2503(b) is satisfied if the transferor wants to take advantage of the annual $10,000 gift tax exclusion.

[116] The age of distribution will be 21 in the absence of direction to the contrary at the time the transfer is made. The transferor may set the age of distribution, however, at anytime between the eighteenth and twenty-first birthdays, inclusive. The following, or words to this effect, should be used in the document creating the custodianship: "The custodian shall transfer this property to _____ when _____ reaches the age of _____." ARK. CODE ANN. § 9-26-220 (Michie 1985).

[117] *See id.*

[118] The distribution will be made when the minor reaches the age of 18, unless the transferor substitutes the words " as custodian for _____ until _____" for the words "as custodian for _____" in the document creating the transfer. The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. CAL. PROB. CODE §§ 3920, 3920.5 (West 1984).

[119] *Id.*

[120] *Id.*

[121] CONN. GEN. STAT. § 45a-549(d) (1992).

[122] Custodianships in Louisiana terminate at age 18 or the age of "judicial emancipation," whichever is earlier. LA. REV. STAT. ANN. § 9:770 (West 1987).

[123] The proceeds will be distributed to the minor when the minor reaches the age of 18, unless the transferring instrument indicates that "The custodian shall transfer _____ to _____ when _____ reaches the age of _____." The specified age of distribution must be between the eighteenth and twenty-first birthdays, inclusive. ME. REV. STAT. ANN. tit. 33, § 1671 (West 1987).

[124] *Id.*

[125] MICH. COMP. LAWS. ANN. § 554.454(4) (West 1980).

[126] MISS. CODE ANN. §§ 91-20-41, 91-20-1 to 91-20-49 (1994).

[127] The distribution will be made when the minor reaches the age of 18, unless the transferor substitutes the words "as custodian for _____ until he attains the age of _____" for the words "as custodian for _____" in the document creating the transfer. The specified age of distribution must be between the eighteenth and twenty-fifth birthdays, inclusive. NEV. REV. STAT. §§ 167.025, 167.034 (1985).

[128] *Id.* § 167.033.

[129] The distribution will be made when the minor reaches the age of 18, unless the transferor substitutes the words "as custodian for _____ until he attains the age of _____" for the words "as custodian for _____" in the document creating the transfer. The specified age of distribution must be between the eighteenth and twenty-first birthdays, inclusive. *Id.* §§ 167.023, 167.034.

[130] In the absence of direction to the contrary at the time the transfer is made, the age of distribution will be 21. The transferor may set the age of distribution, however, at anytime between the eighteenth and twenty-first birthdays, inclusive. N.J. STAT. ANN. § 46:38A (West 1987).

[131] *See id.*

[132] N.Y. EST. POWERS AND TRUSTS LAW §§ 7-9, 7-11 (McKinney 1994). Default age of distribution is 18; transferor must add the language "until age 21" to extend age of distribution to 21.

[133] *See id.*

[134] *See id.* § 7-2.

[135] The age of distribution will be 21 in the absence of direction to the contrary at the time the transfer is made. The transferor may set the age of distribution, however, at anytime between the eighteenth and twenty-first birthdays, inclusive. The following, or words to this effect, should be used in the document creating the custodianship: "The custodian shall transfer this property to _____ when he reaches the age of _____." N.C. GEN. STAT. § 33A-20 (1987).

[136] *See id.*

[137] 20 PA. CONS. STAT. ANN. § 5320 (1992).

[138] S.C. CODE ANN. § 20-7-180(4) (Law. Co-op. 1993).

[139] TENN. CODE ANN. §§ 35-7-221, 35-7-201 to 35-7-226 (Michie Supp. 1994).

[140] TEX. PROP. CODE ANN. §§ 141.006(c), 141.001 to 141.014 (1984). Distribution of proceeds to a minor will take place prior to age 18 if the minor "ceases to be a minor because of marriage or the general removal of the disabilities of minority." *Id.* § 141.006(c)(2).

[141] VT. STAT. ANN. tit. 14, §§ 3204(d), 3201-3209 (1989).

[142] The custodial property will be distributed to the minor when the minor reaches the age of 18, unless the transferring instrument has the annotation "(21)" (or words to that effect) after the words "Virginia Uniform Transfers to Minors Act." In the latter case, the custodial property will be distributed at age 21. VA. CODE ANN. § 31-45D (Michie 1988).

[143] *See id.*

[144] V.I. CODE ANN. tit. 15, §§ 1245(d), 1241-1250 (1964).

From *Toro* to *Tome*: Developments in the Timing Requirement for Substantive Use of Prior Consistent Statements

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Every trial attorney has suffered through the impeachment of a witness. Our adversary system affords judge advocates the opportunity to rebut this type of an attack by offering evidence that sustains or rehabilitates the witness.[1] The two most common rehabilitation methods are to introduce supportive character evidence concerning the witness or, if the type of impeachment allows it, to introduce consistent statements by the impeached witness.[2] *United States v. Toro*,[3] a recent military appellate decision, discusses both these methods.

Toro is interesting for at least two reasons. First, the case involves an exposition of much of the "black-letter" law on witness credibility. The "black letter" propositions in *Toro* merit reiteration, but not extended discussion. In *Toro*, the trial court received testimony from an Air Force investigative agent that the undercover sources were credible, truthful, and among "the very best sources" with whom he had worked in ten years.[4] On appeal, the defense argued that this testimony violated Military Rule of Evidence (MRE) 608(a)[5] because that rule only permits character evidence concerning truthfulness *after* a witness has been attacked, and requires introduction of such evidence by opinion or reputation testimony.[6]

In its analysis, the Court of Military Appeals (COMA)[7] discussed the three evidentiary stages that concern the credibility of witnesses at trial: bolstering, impeachment, and rehabilitation. Bolstering occurs when the proponent seeks to enhance the credibility of the witness *before* the witness is attacked.[8] Impeachment involves a variety of methods,[9] which generally occur *after* a witness testifies.[10] Rehabilitation, by one form

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[1] C. McCORMICK, McCORMICK ON EVIDENCE 172 (John W. Strong ed., 4th ed. 1992).

[2] *Id.*

[3] 37 M.J. 313 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994).

[4] *Id.* at 317.

[5] MANUAL FOR COURTS-MARTIAL, United States, MIL. R. EVID. 608(a) (1984) [hereinafter MCM] provides:

> Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

[6] In the case of reputation testimony, "[t]he proponent must show that the character witness who will testify as to the witness' reputation resides or works in the same community as the witness and has lived in the community long enough to have become familiar with the witness' reputation in the community." *Toro*, 37 M.J. at 317 (citation omitted). The term "community in which he lives" is not subject to an exact geographical location, but means an area where a person is well known and has established the reputation." *Id.* (citation omitted). The proper foundation for opinion evidence, by contrast, requires the proponent to demonstrate that the character witness "knows the witness well enough to have had an opportunity to form an opinion of the witness' character for truthfulness." *Id.* (citation omitted). In *Toro*, the defense conceded that an attack on the character of the informants had taken place. *Id.* at 317-18.

[7] Effective 5 October 1994, pursuant to Pub. L. No. 103-337, § 924, 108 Stat. 2663, the United States Court of Military Appeals (COMA) was renamed the United States Court of Appeals for the Armed Forces (CAAF). This article will use the court's former name for decisions published prior to the name change.

[8] *Toro*, 37 M.J. at 315 (citations omitted). The witness's character trait for truthfulness, as an example, must be attacked before the proponent of the witness may undertake a rehabilitation. MCM *supra* note 5, MIL. R. EVID. 608(a). The attack may be by character evidence, or during cross-examination. Opposing counsel first must imply or attempt to establish that the witness is generally an untruthful person. *Id.* Introduction of contradictory evidence alone does not amount to an attack. United States v. Everage, 19 M.J. 189 (C.M.A. 1985). Nor does contrary testimony alone amount to an implied charge of recent fabrication, improper influence, or motive. United States v. Browder, 19 M.J. 988 (A.F.C.M.R. 1985).

[9] The COMA observed:

> The methods of impeachment include: character trait for untruthfulness—Mil. R. Evid. 608(a), Manual for Courts-Martial, United States, 1984; prior convictions—Mil. R. Evid. 609(a); instances of misconduct not resulting in a conviction—Mil. R. Evid. 608(b); prior inconsistent statements—Mil. R. Evid. 613; prior inconsistent acts—*cf.* Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); bias—United States v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984), and Mil. R. Evid. 608(c); and specific contradiction.

Toro, 37 M.J. at 315. Specific contradiction typically involves a second witness giving testimony contrary to the previous testimony which impeaches indirectly. *See* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 47 (Cleary ed. 1984) (contradiction has the "dual aspect of relevant proof and of reflecting on the credibility of contrary witnesses").

[10] *Toro*, 37 M.J. at 315.

or another, occurs after an attack on a witness's credibility.[11] The COMA emphasized that the "or otherwise" language of MRE 608(a)[12] is sufficiently flexible to permit rehabilitation when cross-examination *implies* the bad character of the witness, or has been conducted in a fashion as to induce belief in the witness's untruthfulness. Under the facts of *Toro*, substantive comments by the Air Force agent did not involve "traditional veracity evidence,"[13] and may have been objectionable because of the proponent's failure to lay a proper opinion or reputation type foundation. However, because the defense failed to object contemporaneously, and because the failure to object did not amount to plain error, the defense omission was waived.[14]

The second interesting aspect of *Toro* more directly concerns the specific issue of rehabilitation. As discussed in greater detail below, the COMA included a veiled suggestion that some members of the court's majority would reconsider precedents on the timing requirement for substantive use of prior consistent statements (*i.e.*, the admissibility of a prior consistent statement made *after* a motive to fabricate arose). Chief Judge Sullivan attacked the propriety of that implicit suggestion in a concurring opinion. The issue is both interesting and moot because in a recent decision, the United States Supreme Court resolved the question entirely. In *Tome v. United States*,[15] the Supreme Court held that to rebut a charge of recent fabrication or improper influence or motive under Federal Rule of Evidence 801(d)(1)(B),[16] a declarant must make a prior consistent statement *before* the alleged fabrication, motive, or influence arose. The Court's decision resolve not only the arguable differences at the CAAF, but resolve a division in the federal circuits[17] and, to some extent, a subject of divergent critical commentary.[18]

Federal litigators need to study any opinion where the Supreme Court interprets the Federal Rules of Evidence. *Tome* merits particular scrutiny by military criminal practitioners for two reasons. First, it comes at a time when several members of the CAAF appear to have doubts about the vitality of that court's precedents. Practitioners who have relied on the implicit suggestion that it may be possible to admit prior consistent statements made after a motive to fabricate has arisen, must rethink their trial tactics to use alternative theories of admissibility. Second, the scenario in *Tome*—alleged child sexual abuse—is one that easily can occur in military prosecutions. Therefore, military counsel should study and, if possible, use the alternative theories of admissibility identified in *Tome*. To better appreciate *Tome's* genesis and impact, a review of prior consistent statements is appropriate.

Background

Until the end of the seventeenth century, prior consistent statements were admissible as substantive evidence *if* they were consistent with the in-court testimony of the witness.[19] With the adoption of the rule against hearsay, this evidence no longer was admitted *substantively*, but was limited to bolstering a witness's credibility during the case-in-chief.[20] One commentator has observed that by the early 1800s, prior consistent statements no longer were admissible during the case-in-chief, but only by way of rebuttal to support witness credibility after impeachment.[21] The prevailing rule was sim-

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[11] "Rehabilitation can take many forms, including explanations on redirect examination, corroboration, a character trait for truthfulness, or prior consistent statements—Mil. R. Evid. 801(d)(1)(B)." *Id.*

[12] *See supra* note 5.

[13] *Toro*, 37 M.J. at 318.

[14] *Id.* at 318 (citing MCM, *supra* note 5, MIL. R. EVID. 103(d)). As no substantial right of the accused was affected, and because the military judge properly instructed the panel members, corrective action was not required.

[15] 115 S. Ct. 696 (1995).

[16] The text of 801(d)(1)(B) is identical for both the Federal Rules of Evidence and the MREs, *see infra* note 25 and accompanying text. For purposes of this article, references to either version will be as Rule 801(d)(1)(B).

[17] Cases imposing a temporal or "pre-motive" requirement include: United States v. White, 11 F.3d 1446 (8th Cir. 1993); United States v. Guevera, 598 F.2d 1094, 1100 (7th Cir. 1979); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978); United States v. Henderson, 717 F.2d 135 (4th Cir. 1983), *cert. denied*, 465 U.S. 1009 (1984); United States v. Bowman, 798 F.2d 333 (8th Cir.), *cert. denied*, 479 U.S. 1043 (1986); United States v. De Coito, 764 F.2d 690 (9th Cir. 1985). Cases which did not impose a "pre-motive" timing requirement include: United States v. Payne, 944 F.2d 1458 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1598 (1992); United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982), *cert. denied sub nom.*, Wright v. United States, 459 U.S. 1117 (1983); United States v. Anderson, 782 F.2d 908, *reh'g denied, en banc*, 788 F.2d 1570 (11th Cir. 1986); United States v. Montague, 958 F.2d 1094 (D.C. Cir. 1992).

[18] *See, e.g.*, Judith A. Archer, *Prior Consistent Statements: Temporal Admissibility Standard Under Federal Rule of Evidence 801(d)(1)(B)*, 55 FORDHAM L. REV. 759 (1987); Note, *Prior Consistent Statements and Motives to Lie*, 62 N.Y.U. L. REV. 787 (1987); LTC Thomas C. Lane, *Military Rule of Evidence 801(d)(1)(B): In Search of a Little Consistency*, ARMY LAW., June 1987, at 33.

[19] Michael H. Graham, *Prior Consistent Statements: Rule 801(d)(1)(B) of the Federal Rules of Evidence, Critique and Proposal*, 30 HASTINGS L.J. 575 (1979) (footnote omitted) [hereinafter *Prior Consistent Statements*].

[20] *Id.* at 577-78. Dean Wigmore has described that practice as having been based "on a loose instinctive logic, popular enough today, that there is a some real corroborative support in such evidence . . . ." 4 WIGMORE ON EVIDENCE § 1123 at 254 (Chadbourn rev. ed. 1972).

[21] *Prior Consistent Statements*, *supra* note 19, at 578.

ply that "where the testimony is assailed as a fabrication of recent date . . . in order to repel such imputation, proof of the *antecedent* declaration of the party may be admitted."[22]

The use of the prior consistent statement for the limited purpose of corroborating a witness's testimony also was common military practice. The 1969 *Manual for Courts-Martial* described this practice in the following terms:

> If the testimony of a witness has been attacked on the ground that it was due to a certain influence, evidence of his statements or conduct, consistent with his testimony, made or occurring before the creation of that influence, may be introduced for the purpose of corroborating his testimony.[23]

In one decision, the COMA noted that "this paragraph perpetuated what had been the consistent rule in the military justice system at least as early as the 1929 Manual for Courts-Martial; and it was parallel, as well, with what had been the more recent common law rule."[24]

The codification of the Federal Rules of Evidence and, subsequently, the Military Rules of Evidence, effected a profound change in the treatment of a certain class of prior consistent statements. The text provides as follows:

> (1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[25]

Under the rules, prior consistent statements are defined as *nonhearsay* and may be admissible as *substantive evidence*, as long as the declarant testifies at trial and is subject to cross-examination,[26] and the requirements or situations specified in the rule are satisfied. The predicate situations specified in the text of the rule include rebuttal of an express or implied charge[27] of recent fabrication[28] or improper motive. Those are situations recognized at common law.[29] The rationale for the current rule is that the prior statement is consistent with

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[22] Ellicott v. Pearl, 35 U.S. 412, 439 (1836) (*quoted in* Tome v. United States, 115 S. Ct. 696, 700 (1995)); *see also* Malone v. United States, 94 F.2d 281, 287 (7th Cir.) *cert. denied*, 304 U.S. 562 (1938) ("[W]here the testimony of a witness [was] assailed as a fabrication of a recent date, proof that [the witness] gave a similar account of the transaction when no motive existed, [was] admissible.").

[23] MANUAL FOR COURTS-MARTIAL, United States, ¶ 153a (rev. ed. 1969). The 1969 *Manual for Courts-Martial* expanded on the principle through the use of the following illustrative examples:

> For example, if the credibility of a witness has been attacked on the ground of bias due to a quarrel with the accused, the fact that before the date of the quarrel he made an assertion similar to his testimony is admissible for this purpose. Similarly, if his impeachment has been sought on the ground of collusion or corruption, evidence of a consistent statement made by him prior to the collusion or corruption is admissible for the same purpose. Also, if the testimony of a witness has been attacked on the ground that he made one or more inconsistent statements or on the ground that it was a fabrication of recent date, evidence of a consistent statement made by him before there was a motive to misrepresent is admissible to corroborate his testimony.

Id.

[24] United States v. McCaskey, 30 M.J. 188, 189-90 (C.M.A. 1990) (footnotes omitted).

[25] FED. R. EVID. 801(d)(1)(B); MCM, *supra* note 5, MIL. R. EVID. 801(d)(1)(B).

[26] The requirement for cross-examination normally is satisfied when the witness, under oath, willingly responds to questions. United States v. Owens, 484 U.S. 554 (1988). The requirement in Rule 801(d)(1)(B) is not identical to the Sixth Amendment Confrontation Clause requirement. United States v. DiCaro, 772 F.2d 1314, 1325 (7th Cir. 1985), *cited in* United States v. Tome, 3 F.3d 342, 347 (10th Cir. 1993), *rev'd*, 115 S. Ct. 696 (1995). The *Tome* court observed that "Rule 801(d)(1)(B) requires that the witness be subject to cross-examination *concerning the prior consistent statement only*. The Rule does not require cross-examination concerning the events underlying the statement or the matter asserted therein." *Tome*, 3 F.3d at 348 (citing 4 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 419 at 179-80 (1980)).

[27] Two examples illustrate the difference between an *implied* and *express* charge of improper motive. First, the cross-examiner asks a witness the question, "You are the mother of the defendant, aren't you?" The cross-examiner in this scenario leaves the natural inference of bias to the trier of fact. An *express* charge of improper motive would involve an additional question: "You would do anything to help your son, wouldn't you?" In the second scenario, the previously implied inference of bias actually is articulated. *See* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.12 at 752 n.5 (3d ed. 1991).

[28] A charge of recent fabrication has been made whenever, on cross-examination, counsel expressly or impliedly charges that the in-court testimony of the witness, regardless of when the testimony was crystallized, is a result of a conscious falsification occurring at any time after the event related. Analytically, the use of the term "recent" is superfluous. *Prior Consistent Statements*, *supra* note 19, at 583. In other words, the language "recent fabrication" is directed at a witness who is charged with a deliberate lie. SALTZBURG & MARTIN, 2 FEDERAL RULES OF EVIDENCE MANUAL 143 (5th ed. 1990).

[29] *See* United States v. Quinto, 582 F.2d 224 (2d Cir. 1978). The court stated the following:

> [T]he drafters of the proposed Federal Rules of Evidence intended that prior consistent statements could be used as substantive evidence only in those "situations in which rehabilitation through consistency formerly would have been allowed". . . . [T]he standards for determining whether prior consistent statements can be admitted as substantive evidence are precisely the same as the traditional standards and . . . continue to be the standards used under the new rules of evidence for determining which varieties of prior consistent statements can be admitted for the more limited purpose of rehabilitation.

Id. at 233-34 (citations omitted), *quoted in* GRAHAM, *supra* note 27, § 801.12 at 752 n.4.

the testimony given from the stand and if the opposing party wishes to "open the door" for its admission, there is no reason why it should not be received generally.[30]

The rule does not abolish the *nonsubstantive* use of prior consistent statements. Prior consistent statements that do not satisfy the requirements of Rule 801(d)(1)(B) still may be used for rehabilitation only, and not for their truth.[31] One commentator highlights the practical distinction between using prior consistent statements as credibility evidence and substantive evidence by noting that in the former case, "the judge would give a limiting instruction, restricting the jurors' use of the statement to their evaluation of the witness' believability." In closing argument, therefore, the proponent could only argue the evidence in the limited manner specified by the judge.[32] By contrast, for a substantive use of prior consistent statements, the judge would give no limiting instruction, and the proponent could treat the statements as evidence of facts.[33]

The Timing or "Pre-Motive" Requirement

In general, assuming that the requirements specified in Rule 801(d)(1)(B) are met, the time at which the declarant made the prior consistent statement is the most important consideration in determining its admissibility. Dean McCormick has observed:

> [I]f the attacker has charged bias, interest, corrupt influence, contrivance to falsify, or want of capacity to observe or remember, the applicable principle is that the prior consistent statement has no relevancy to refute the charge unless the consistent statement was made *before* the source of the bias, interest, influence or incapacity originated.[34]

The rationale for this viewpoint is that "[a] consistent statement, at a time prior to the existence of a fact said to indicate bias, interest or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence."[35] According to this analysis, a prior statement subject to the same influence as the already impeached trial testimony has no force to rebut the charge; all it shows is that the witness responded in the same way when under the same pressures.[36] The plain language of the rule, however, does not require that the prior consistent statement precede the improper influence, motive to fabricate, or alleged recent fabrication.[37] Moreover, the Drafter's analysis to MRE 801(d)(1)(B) specifically questions the propriety of the so-called "pre-motive" limitation.[38]

As noted previously, *Toro* suggested the possible use of prior consistent statements made *after* the alleged motive to fabricate arose. The Air Force Court of Military Review (AFCMR) more fully articulates the background to the admission of those statements.[39] The AFCMR's opinion explained that through carefully planned direct examination, the trial counsel disclosed the misconduct of the government witnesses, thus depriving the defense counsel of "fodder for cross-examination in most areas other than prior inconsistencies."[40] When the defense counsel examined those witnesses to show prior inconsistencies, the trial counsel introduced written

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[30] SALTZBURG & MARTIN, *supra* note 28, at 248, Advisory Committee Notes. *See also* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 801(d)(1)(B)[01] at 801-150 (1988) (evidence not cumulative where opponent's attack opens the door; jury probably would not understand a limiting instruction).

[31] *See, e.g.,* United States v. Parodi, 703 F.2d 768 (4th Cir. 1983) ("[P]roof of prior consistent statements of a witness whose testimony has been allegedly impeached may be admitted to corroborate his credibility whether under Rule 801(d)(1)(B) or under traditional federal rules, irrespective of whether there was a motive to fabricate"); United States v. Casoni, 950 F.2d 893 (3d Cir. 1991) (Where statements are offered only to rehabilitate, possible motive to fabricate at time statements were made is a matter of relevance, not a condition barring admissibility.).

[32] EDWARD J. IMWINKELRIED, EVIDENTIARY DISTINCTIONS, UNDERSTANDING THE FEDERAL RULES OF EVIDENCE 139 (1993).

[33] *Id.* at 140. *See generally* United States v. White, 11 F.3d 1446 (8th Cir. 1993) (rehabilitative prior consistent statements admissible when accompanied by a limiting instruction even though inadmissible under Rule 801(d)(1)(B)).

[34] MCCORMICK, *supra* note 1, § 47 at 177.

[35] WIGMORE, *supra* note 20, § 1128 at 268.

[36] Archer, *supra* note 18, at 766 n.38.

[37] The rationale for the timing requirements is simply that

> [a] consistent statement, at a time prior to the existence of a fact said to indicate bias, interest or corruption, will effectively explain away the force of the impeaching evidence; because it is thus made to appear that the statement in the form now uttered was independent of the discrediting influence.

4 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1128 at 268 (Chadbourn rev. ed. 1974). A prior statement subject to the same influence as the already impeached trial testimony has no force to rebut the charge; all it shows is that the witness responded in the same ways when under the same pressures.

[38] *See* MCM, *supra* note 5, MIL. R. EVID. 801(d)(1)(B) analysis, app. 22, at A22-47 ("On its face the Rule does not require that the consistent statement offered have been made prior to the time the improper influence arose or prior to the alleged recent fabrication.").

[39] United States v. Toro, 34 M.J. 506 (A.F.C.M.R. 1991).

[40] *Id.* at 515.

statements as prior consistent statements.[41] Significantly, the statements introduced were made by the declarants to investigators *after* the declarants had become aware that they were the subject of governmental investigations, and *after*, as the AFCMR put it, they "had a motive to sing, and no particular motive to sing truly."[42] Because of the *timing* of the prior consistent statements, both the AFCMR and, to a far lesser extent, the COMA, interpreted MRE 801(d)(1)(B) and earlier precedents.

The major military precedent in this area is *United States v. McCaskey*,[43] which involved allegations of indecent acts against a female child.[44] In *McCaskey*, the COMA held that to be logically relevant to rebut a charge of testifying while under an improper influence or motive, a prior consistent statement typically

> must have been made *before* the point at which the story was fabricated or the improper motive or influence arose. Otherwise, the prior statement . . . does nothing to "rebut" the charge. Mere repeated telling of the same story is not relevant to whether the story, when told at trial, is true.[45]

McCaskey observed that there was a "remote possibility" in which a prior consistent statement made *after* the point of the alleged fabrication or improper influence would be probative within the framework of the court's analysis of MRE 801(d)(1)(B).[46] *McCaskey* was decided after the trial in *Toro* and because of this, the language of the Drafter's Analysis to MRE 801(d)(1)(B),[47] and the absence of an objection at trial, the AFCMR chose not to apply the *McCaskey* decision retroactively to *Toro*.[48]

Against the seemingly categorical background of *McCaskey*, the COMA's majority opinion in *Toro* was somewhat equivocal when it noted that in applying the *McCaskey* rule, the military judge must determine "when the motive to fabricate occurred, *e.g.*, at trial or before trial; whether the statement sought to be admitted rebuts the recent fabrication, improper influence or motive; and whether the prior consistent statement is relevant."[49] As authority for that proposition, the COMA cited *United States v. Montague*,[50] and, in a footnote, observed:

> There is a split in the circuits . . . and the differences in individual cases can be reconciled by collapsing the authorities "into one principle that would be consistent with the goals of the Federal Rules of Evidence and common law precedents. Any statement, even one made after a motive to falsify has arisen, may be used under Rule 801(d)(1)(B) if it tends to disprove a suggestion that a witness is not telling the truth."[51]

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[41] *Id.*

[42] *Id.*

[43] 30 M.J. 188 (C.M.A. 1990). Prior to *McCaskey*, in United States v. Sandoval, 18 M.J. 55, 62-63 (C.M.A. 1984), the COMA had noted that "the proponent of the witness impeached . . . may rehabilitate the witness by introducing a prior consistent statement given *before* the event which is alleged to have resulted in the fabrication." *See also* United States v. Jones, 26 M.J. 197 (C.M.A. 1988) (defense counsel demonstrated lack of memory and attempted to show that appellant's identity had been suggested to the witness by someone else); United States v. Hurst, 29 M.J. 477 (C.M.A. 1990) (noting various treatments of the timing requirement, but concluding that resolving that issue was not required under the facts of the case because the most stringent timing requirement was satisfied).

[44] Chief Judge Everett described this scenario as one which "regrettably is not uncommon." *McCaskey*, 30 M.J. at 189.

[45] *Id.* at 192. In *McCaskey*, the COMA observed that prior consistent statements might be offered as evidence in two general situations. The first is impeachment of a witness by a prior inconsistent statement and a prior consistent statement made *after* the inconsistent statement is offered to explain or otherwise remove the taint of inconsistency. *Id.* at 192-93. If offered to prove the truth of the matter asserted, the prior consistent statement must fit the "narrow confines" of Rule 801(d)(1)(B). *Id.* at 193. In the second situation, the prior consistent statement is offered as evidence of the fact of the statement rather than as evidence of its content. *Id.* In that situation, a hearsay objection would not lie and, accordingly, the requirements of Rule 801(d)(1)(B) would not control, although the COMA noted that the parties

> should be vigilant to ensure both that the fact of the statement is relevant for some purpose (*i.e.*, credibility of the witness, *see* Mil. R. Evid. 607) and that the probative value is not "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members." Mil. R. Evid. 403.

Id.

[46] *Id.* at 189 n.2.

[47] *See supra* note 38.

[48] United States v. Toro, 34 M.J. 506, 516 (A.F.C.M.R. 1991). The COMA has reiterated the *McCaskey* holding on several occasions. *See* United States v. Rhea, 33 M.J. 413 (C.M.A. 1991) (evidence established that entries on calendar signifying incidents of sexual intercourse with appellant were made *prior* to any motive to fabricate which might have arisen), *aff'd after remand*, 37 M.J. 213 (C.M.A. 1993); United States v. Morgan, 31 M.J. 43, 46 (C.M.A. 1990) (improper motive and alleged fabrication urged under two theories, but impeachment used UCMJ Article 32 inconsistencies, thereby making pre-Article 32 statements admissible under *McCaskey* and circumstances of the case), *cert. denied*, 498 U.S. 1085 (1991).

[49] United States v. Toro, 37 M.J. 313, 315 (C.M.A. 1993), *cert. denied*, 114 S. Ct. 919 (1994) (citation omitted). The COMA also noted that when these prerequisites have been met, the military judge should apply the balancing test of MRE 403. *Id.* at 315-16.

[50] 958 F.2d 1094, 1098 (D.C. Cir. 1992).

[51] *Toro*, 37 M.J. at 315-16 n.2 (citation omitted).

In his concurring opinion, Chief Judge Sullivan specifically rejected the majority's footnoted suggestion that prior consistent statements made after an alleged motive to fabricate may be admissible under MRE 801(d)(1)(B).[52]

The Case of *United States v. Tome*

Like *McCaskey*, *Tome* involved allegations of sexual abuse. The victim was A.T., a minor female child.[53] The defendant and victim's mother shared joint custody of the victim following their divorce in 1988, with the defendant having primary physical custody.[54] The prosecution argued that the defendant had committed the sexual abuse on the child while she was in the defendant's custody. The defense averred that the child concocted the allegations so that she would not be returned to her father.[55] At the time of trial, the alleged victim was six-and-one-half years old.

The defense cross-examination of A.T. occurred over two separate days, involving a total of 597 questions.[56] During the second day of cross-examination, the alleged victim testified with hesitation, but acknowledged discussing the matter of the alleged abuse with several physicians.[57] In response to the cross-examination, the prosecution proffered the testimony of six witnesses under Rule 801(d)(1)(B) and other theories, alleging that during cross-examination of the victim, the defense had implied that she had fabricated the allegations of abuse to live with her mother in Colorado.[58]

All of the six statements were made after A.T. had gone to Colorado to stay with her mother in the summer of 1990. The witnesses included a babysittter who stated that A.T. had spontaneously stated that she did not want to return to her father because he got drunk and thought A.T. was "his wife." Several days later A.T. had elaborated by saying that her father did "nasties" to her, including removing her clothes, forcing open her legs, and causing a sharp pain in her stomach.[59] A pediatrician testified to examining A.T. and finding an enlarged vagina and abnormally thin hymenal tissue, symptoms consistent with vaginal penetration. Pointing to the genital region of an anatomically correct male doll, A.T. told the pediatrician that her father had put his "thing" in her vagina.[60] Another pediatrician who examined A.T. at approximately the same time testified similarly concerning the condition of A.T's hymen, the size of her vagina, and physical penetration of A.T. by her father's "thing."[61] A caseworker for the Colorado Child Protective Services office testified that with the aid of anatomically correct dolls, A.T. demonstrated an act of attempted intercourse and stated that her father removed her panties, "put his balls" in her, kissed her vagina, and asked her to touch his penis.[62] A.T.'s mother testified that she had heard some of the statements made to the babysitter.[63] A third pediatrician examined A.T. approximately one year after the allegations of abuse arose, and two years after the abuse allegedly occurred. She testified that A.T. had an abnormally enlarged vagina with little hymenal tissue remaining. She also testified that A.T. had stated that her father touched her breasts, her "front privates," and her bottom.[64]

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[52] *Id.* at 320 (Sullivan, C.J., concurring in the result).

[53] Tome v. United States, 115 S. Ct. 696, 699 (1995). Federal jurisdiction resulted because the case occurred on a Navajo Indian Reservation. The defendant was tried in the District Court for the District of New Mexico for violating 18 U.S.C. §§ 1153 ("Offenses Within Indian Country"), 2241(c) ("Aggravated Sexual Abuse"), and 2245(2)(A) and (B) (Definitions). *Id.*

[54] *Id.* The mother was awarded primary custody for the summer of 1990, and during that time she contacted Colorado authorities with allegations of sexual abuse by the defendant against his daughter. *Id.* The superseding indictment alleged that the sexual abuse occurred in June 1989, when the victim was four years old. United States v. Tome, 3 F.3d 342, 345 (10th Cir. 1993), *rev'd* 115 S. Ct. 696 (1995).

[55] *Tome*, 115 S. Ct. at 699.

[56] *Tome*, 3 F.3d at 348. On the first day the defense asked 348 "background" questions. The victim replied to nearly all of the questions. On the second day of cross-examination the defense posed 249 questions, of which 66 elicited no audible response from the alleged victim. *Id.* The victim provided some of her responses as much as 45 or 50 seconds after the question. *Id.* at 348 n.4.

[57] *Id.* at 345.

[58] *Id.* at 346-47.

[59] *Id.* at 345. The babysitter's testimony also was offered and admitted under Federal Rule of Evidence 803(24), the so-called residual exception to the hearsay rule. *Tome*, 115 S. Ct. at 700.

[60] *Tome*, 3 F.3d at 346.

[61] *Id.* The testimony of both pediatricians apparently was offered and admitted into evidence pursuant to Federal Rule of Evidence 803(4), the hearsay exception concerning statements made for purposes of medical diagnosis. *Tome*, 115 S. Ct. at 700.

[62] *Tome*, 3 F.3d at 346. These statements also were offered pursuant to the residual exception, Federal Rule of Evidence 803(24), but the record did not disclose how the judge ruled on that ground. *Tome*, 115 S. Ct. at 700.

[63] *Tome*, 3 F.3d at 346.

[64] No objection was made to this testimony. *Tome*, 115 S. Ct. at 700.

On initial appeal, in a matter of first impression, the United States Court of Appeals for the Tenth Circuit (Tenth Circuit) affirmed.[65] The Tenth Circuit rejected the "pre-motive rule" and declined to limit Rule 801(d)(1)(B) to statements made *prior* to the existence of the declarant's motive to fabricate. Stated succinctly, the Tenth Circuit held that the timing of the alleged fabrication or motive to falsify does not control admission.[66] The principal ground articulated by the Tenth Circuit was that even as a function of relevance, the "pre-motive" rule is too broad. The Tenth Circuit observed:

> [A] *per se* rule is untenable because it is simply not true that an individual with a motive to lie always will do so. Rather, the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie.[67]

The resulting balancing approach adopted by the Tenth Circuit derived principally from *United States v. Miller*,[68] in which the United States Court of Appeals for the Ninth Circuit had enjoined trial judges to "evaluate whether, in light of the potentially powerful motive to fabricate, the prior consistent statement has significant 'probative force bearing on credibility apart from mere repetition.'"[69] Applying that analysis to the facts of *Tome*, the Tenth Circuit concluded that the defendant's arguments presented some motive for A.T. to lie, but "not a particularly strong one."[70] Accordingly, the Tenth Circuit held that the trial judge had not abused his discretion in admitting A.T.'s out-of-court statements.[71]

The Supreme Court granted certiorari to resolve the question of whether evidence of prior consistent statements introduced to rebut a pre-existing motive to fabricate was inadmissible under Rule 801(d)(1)(B).[72] In a five-to-four decision,[73] the Court reversed, concluding:

> The Rule permits introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive. Those conditions of admissibility were not established here.[74]

The majority's analysis began with a recapitulation of the established principles surrounding the evidentiary question presented. The majority observed that admissibility under Rule 801(d)(1)(B) is limited to statements offered to rebut a charge of "recent fabrication or improper influence or motive." The Court emphasized that the quoted phrase was the one used by the Advisory Committee Notes on Rule 801(d)(1)(B) to describe the "'traditiona[l]' common law of evidence, which was the background against which the rules were drafted."[75] In the Court's view, the drafter's limitation is instructive because the specified forms of impeachment are the ones in which "the temporal requirement makes the most sense."[76] The Court observed:

> Impeachment by charging that the testimony is a recent fabrication or results from an improper influence or motive is, as a general matter, capable of direct and forceful refutation through intro-

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[65] *Tome*, 3 F.3d at 352.

[66] The appellant also alleged that admission of the statements pursuant to Rule 801(d)(1)(B) was inappropriate for failure to satisfy the Rule's explicit requirements. He asserted that the victim had not been subject to cross-examination and that the defense did not charge the victim with recent fabrication or improper motive. *Id.* at 347-49. The Tenth Circuit rejected both arguments.

[67] *Id.* at 350. Stated differently, "[t]he circumstances under which statements are made may add probative significance to the statements." Lane, *supra* note 18, at 33.

[68] 874 F.2d 1255 (9th Cir. 1989).

[69] *Id.* (quoting United States v. Pierre, 781 F.2d 329, 333 (2d Cir. 1986)), *both quoted in Tome*, 3 F.3d at 350). The Tenth Circuit observed that "the relevance of the prior consistent statement is more accurately determined by evaluating the strength of the motive to lie, the circumstances in which the statement is made, and the declarant's demonstrated propensity to lie." *Tome*, 3 F.3d at 350.

[70] *Tome*, 3 F.3d at 351 (citation omitted).

[71] *Id.*

[72] Tome v. United States, 114 S. Ct. 1048 (1994).

[73] Justice Kennedy authored the majority decision, in which Justices Stevens, Souter, and Ginsburg entirely joined. Justice Scalia concurred in part and concurred in the judgment. Chief Justice Rhenquist and Justices O'Connor and Thomas joined in the dissent authored by Justice Breyer.

[74] Tome v. United States, 115 S. Ct. 696, 705 (1995).

[75] *Id.* at 701 (citation omitted). The Court ultimately concluded that the language of the Rule (in its concentration of rebutting charges of recent fabrication, improper influence, and motive to the exclusion of other forms of impeachment), and the wording (which the Court observed to follow the common law cases) all suggested that the Rule was intended to carry over the common law "pre-motive" rule. *Id.* at 702.

[76] *Id.* at 701.

duction of out-of-court-consistent statements that predate the alleged fabrication, influence or motive. A consistent statement that predates the motive is a square rebuttal of the charge that the testimony was contrived as a consequence of that motive.[77]

As a corollary, the majority noted that "prior consistent statements carry little rebuttal force when most types of impeachment are involved."[78]

The court acknowledged that instances may arise when out-of-court statements that postdate the alleged fabrication nonetheless have probative force to rebut the charged fabrication, but they do so in "a less direct and forceful way."[79] If the drafters intended to countenance such an "indirect inferential chain," the Court perceived sound reason for the specific limitations imposed by the Rule. In other words, there would be no reason "not to admit consistent statements to rebut other forms of impeachment as well."[80] Because this was not done, the Court concluded that "the drafters of Rule 801(d)(1)(B) were relying on the common-law temporal requirement."[81] The "narrow Rule" enacted by Congress could not be read as broadly as had been done by the Tenth Circuit.[82] The Court buttressed its conclusion by examining the Advisory Committee Notes to the Federal Rules of Evidence.[83] The essence of that analysis was that the Committee Notes definitely disclosed an intent by the drafters to adhere to the common law, at least absent express provisions to the contrary. The government presented, and the Court found, no evidence of any intent by the drafters to abandon the common-law "pre-motive" requirement.[84]

The Court also rejected the government's arguments that the "pre-motive" rule is inconsistent with the liberal relevancy provisions of the Federal Rules of Evidence, and contrary to academic commentary. In so holding, the Court observed that the government's arguments misconceived the hearsay provisions of the rules. Relevance alone does not dispose of the question of admissibility for out-of-court statements, as demonstrated by the general proscription of hearsay testimony.[85] Similarly, while commentators may have suggested moving from the general exclusion of out-of-court statements to a balancing approach, the Advisory Committee was categorical in its rejection of the statement-by-statement balancing of probative value against prejudicial effect.[86] The approach advanced by the government, and used by the Tenth Circuit, created several "dangers"[87] which the Advisory Committee had sought to avoid: "too great a measure of judicial discretion";[88] minimal predictability of rulings; and enhanced difficulty in trial preparation.[89]

The dissent argued that the majority had erred in overemphasizing the hearsay-related aspects of the prior consistent statements at the expense of "[t]he basic issue . . . relevance."[90] In the dissent's view, Rule 801(d)(1)(B) has nothing to do with relevance except that at common law, "the prior consistent statement had no *relevance* to rebut the charge that the in-court testimony was the product of the motive to lie."[91] Nothing in the Rule demonstrates the majority's premise that

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[77] *Id.*

[78] *Id.* (citation omitted).

[79] *Id.*

[80] *Id.* at 702.

[81] *Id.*

[82] *Id.*

[83] While joining in the remainder of the majority decision, Justice Scalia did not concur in this portion of the majority opinion, Part II-B, because, as he stated, "the promulgated Rule says what it says, regardless of the intent of its drafters." *Id.* at 706 (citation omitted). In his view, the result reached by the majority was correct because only the temporal limitation "makes it rational to admit a prior corroborating statement to rebut a charge of recent fabrication or improper motive, but not to rebut a charge that the witness' memory is playing tricks." *Id.*

[84] *Id.* at 704.

[85] *Id.* (citation omitted).

[86] *Id.*

[87] *Id.*

[88] Notwithstanding the surprising reticence displayed by the Court in this regard, the Court was somewhat more optimistic concerning the judiciary's ability to discern *when* a particular fabrication, influence, or motive arose. "[C]ourts were performing this task for well over a century . . . and the Government has presented us with no evidence that those courts, or the judicial circuits that adhere to the rule today, have been unable to make the determination." *Id.* at 705.

[89] *Id.*

[90] *Id.* at 706.

[91] *Id.*

the drafters singled out that particular subset of prior consistent statements because of its strong probative force in rehabilitating a witness.[92] The Rule simply carved out a particular subset of prior consistent statements that formerly was admissible only to rehabilitate, and makes those statements substantively admissible. The dissent would read the Rule's plain words to mean what they say.[93] Nothing in the plain text of the Rule compels a conclusion that it codified the common law timing requirement.[94] On the other hand, there may be situations where special circumstances indicate that a "*post*-motive" statement was made for reasons other than the alleged improper motivation.[95] In these cases, the prior statement might refute the charge of fabrication or improper motive "because circumstances indicate that the statements are not causally connected to the alleged motive to lie."[96]

The dissent also focused on the liberal relevancy provisions of Article IV of the Federal Rules of Evidence.[97] It compared the temporal requirement of Rule 801(d)(1)(B) with the "general acceptance" standard of *Frye v. United States*.[98] Both rules were "rigid," setting forth "an absolute prerequisite to admissibility" at odds with the liberal thrust of the Federal Rules of Evidence.[99] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[100] as characterized by the dissenters, the Supreme Court suggested that "the liberalized relevancy provisions of the Federal Rules can supersede a pre-existing rule of relevance, at least where no compelling practical or logical support can be found for the pre-existing rule."[101] The dissent found no such practical or logical support for the majority's view in *Tome*.

Finally, the dissent observed that if the drafters of Rule 801(d)(1)(B) wanted to insulate the common-law rule from the liberalized relevancy provisions of the Federal Rules of Evidence, they chose a "remarkably indirect" manner to do it.[102] They based this observation on the utter silence concerning the "pre-motive" rule as well as the hearsay—as opposed to relevancy—considerations on which Rule 801(d)(1)(B) was based. Those considerations led the dissent to propose "an equally plausible reason" for writing Rule 801(d)(1)(B) in the way it was done: to allow as substantive evidence a type of prior consistent statement particularly impervious to limiting instructions.[103]

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[92] *Id.* at 707. The dissent observed that other prior consistent statements "seem likely to have strong probative force" and that, in any event, the existence of the timing requirement does not follow from the premise. The timing of the statement may diminish probative force, but not reliability, which is the essential concern of hearsay law. *Id.*

[93] *Id.* at 708.

[94] *Id.* at 709.

[95] The dissent gives the following examples: a postmotive statement made spontaneously, or when the speaker had a far weaker motive to lie than at trial, or when the speaker had a far more powerful motive to tell the truth. *Id.* at 708.

[96] *Id.*

[97] The dissent observed the following:

> The Rules direct the trial judge generally to admit all evidence having "any tendency" to make the existence of a material fact "more probable or less probable than it would be without the evidence." Fed. Rules Evid. 401, 402. The judge may reject the evidence (assuming compliance with other rules) only if the probative value of the evidence is substantially outweighed by its tendency to prejudice a party or delay a trial. Rule 403.

Id. at 709.

[98] 293 F. 1013 (D.C. Cir. 1923). The *Frye* test required that "the [science] from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014.

[99] *Tome*, 115 S. Ct. at 709 (citations omitted).

[100] 113 S. Ct. 2786 (1993). In *Daubert*, the Supreme Court ended a substantial debate by ruling that the Federal Rules of Evidence supersede the *Frye* test, vacating and remanding a Ninth Circuit decision refusing to allow evidence that prenatal ingestion of the drug Bendectin caused birth defects. The Ninth Circuit had affirmed a finding that the evidence did not meet the *Frye* "general acceptance" test.

[101] *Tome*, 115 S. Ct. at 709.

[102] *Id.*

[103] *Id.*

A Word for Practitioners

There are many different and arguably meritorious formulations of the dissent's arguments against the strict imposition of a "pre-motive" timing requirement.[104] As a practical matter, however, practitioners now must satisfy the temporal requirement confirmed in *Tome*. In particular, advocates must anticipate the possible need for alternative theories of admissibility for prior consistent statements, because evidence that may be admitted for one purpose but not another is nevertheless admissible.[105]

The first step is to recognize that not every type of impeachment opens the door to the admission of prior consistent statements,[106] and not all prior consistent statements will qualify for substantive use. It is generally agreed that when an attack takes the form of character impeachment through a showing of misconduct, convictions, or bad reputation, rehabilitation by offering prior consistent statements would be inapposite.[107] A more controversial scenario arises when rehabilitation with prior consistent statements occurs after impeachment with *inconsistent* statements. In this case, the propriety of rehabilitation by prior consistent statements depends largely on whether it is what Wigmore describes as a "proved fact" that the witness has uttered the inconsistent statement. If the inconsistent statement concededly was made, a prior consistent statement will not explain it away or diminish its discrediting character.[108] If, however, "the attacked witness denies the making of the inconsistent statement then some courts consider that the evidence of consistent statements near the time of the alleged inconsistent one, is relevant to fortify his denial."[109]

Naturally, whether a prior consistent statement meets the requirements for substantive use, or whether it actually rehabilitates a witness is a decision left to the discretion of the judge.[110] In *United States v. Castillo*,[111] for example, a trial judge did not abuse his discretion in admitting a prior statement for the limited purpose of clarifying an apparent contradiction brought out during cross-examination. In *Castillo*, an undercover police officer made a cocaine purchase. He testified without objection that immediately after the purchase, he reported to his commanding officer that one of the accused had displayed a handgun, which made it necessary for him to snort cocaine before leaving the apartment. Throughout trial the defense sought to discredit the credibility of the police officer by arguing that he lied about the presence of the gun to justify his use of cocaine. The defense argued, and the prosecution agreed, that the police officer had a motive to fabricate the story concerning the ingestion of cocaine *before* he was debriefed by the commanding officer. The prosecution argued, however, that the commander's testimony was offered to rehabilitate the officer's credibility. The court admitted the commanding officer's statement.[112] The reviewing court stated that where a prior statement casts doubt on whether an inconsistent statement was made, or whether such a statement really was inconsistent, the standard for admitting the prior statement is less onerous than under Rule 801(d)(1)(B).[113]

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[104] *E.g.*, the rule denies the factfinder complete information: The jury is the "finder of fact and weigher of credibility, [and] historically has been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52 (1984). Admission of prior statements that satisfy the explicit requirements of MRE 801(d)(1)(B) would better serve the "great principle of completeness now embodied in Rule 106." United States v. Rubin, 609 F.2d 51, 70 (Friendly, J., concurring and discussing rehabilitative use of prior consistent statement), *aff'd on other grounds*, 449 U.S. 424 (1981). For further and more detailed discussion of these matters see Note, *Prior Consistent Statements and Motives to Lie*, 62 N.Y.U. L. REV. 787, 793 (1987). Although not discussed in particular detail in *Tome*, a textual reading of the Rule generally is consistent with recent treatment of evidentiary rules by the Supreme Court. *See* Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993) (*Frye* test not part of the Federal Rules of Evidence, and Rule 702 does not require general acceptance in the scientific community as a prerequisite to admission of scientific evidence); United States v. Salerno, 112 S. Ct. 2503 (1992) (to respect the judgments Congress made in codifying the hearsay exceptions, "[the Court] must enforce the words that it enacted"), *vacated, on reh'g, en banc, sub nom.* United States v. DiNapoli, 8 F.3d 909 (2d Cir. 1993); Huddleston v. United States, 485 U.S. 681 (1988) (Bad acts evidence was admissible under 404(b) if the jury could reasonably conclude that the other act occurred. Judicial screening of the other act evidence was not required by the plain text of the rules.); Bourjaily v. United States, 483 U.S. 173 (1987) (plain language analysis leads to conclusion that a trial court, in determining facts relevant to Rule 801(d)(2)(E), was not required to look only at independent evidence other than statements offered for admission).

[105] *Abel*, 469 U.S. at 56.

[106] As stated previously, the cross-examiner must infer that the witness's testimony is the product of recent fabrication or improper influence or motive.

[107] MCCORMICK, *supra* note 1, § 47 at 177.

[108] WIGMORE, *supra* note 20, § 1126 at 260 (footnotes omitted).

[109] MCCORMICK, *supra* note 1, § 47 at 178 (footnote omitted).

[110] United States v. Pierre, 781 F.2d 329 (2d Cir. 1986); United States v. Brennan, 798 F.2d 581 (2d Cir. 1986), *cert. denied*, 490 U.S. 1022 (1989)).

[111] 14 F.3d 802 (2d Cir. 1994).

[112] *Id.* at 805-06.

[113] *Id.* at 806 (citations omitted). If that initial threshold is satisfied, three criteria generally must be met: there must be a specific (as opposed to a general) impeachment of the witness's credibility; the consistent statement must respond to the impeachment (*i.e.*, contradiction or presentation of a misleading impression of the witness's in-court testimony); and the consistent statement must have probative force beyond mere repetition of what the witness stated earlier. The requisite probative force is present when the prior statement casts doubt on whether the witness made a prior inconsistent statement, or whether the impeaching statement really is inconsistent with the trial testimony, or when the consistent statement will amplify or clarify the allegedly inconsistent statement. *See generally* Note, *Pierre and Brennan: The Rehabilitation of Prior Consistent Statements*, 53 BROOK. L. REV. 515, 528-33 (1987).

In another example, *United States v. Chandler*,[114] the COMA noted that when evidence was admissible under MRE 803(2), the excited utterance exception to the hearsay rule, it was unnecessary to meet the requirements for a prior consistent statement.[115] Accordingly, the military judge did not abuse his discretion in admitting the statements to another person simply because they did not satisfy the nominal requirements for a prior consistent statement.

Tome confirms that the status of the victim cannot be a basis to alter evidentiary rules, but it may suggest a search for alternative theories.[116] Practitioners should focus particularly on the residual exception to the hearsay rule.[117] As the Court noted, where the proponent offers a hearsay statement "that contains strong circumstantial indicia of reliability, that are highly probative on the material questions at trial, and that are better than other evidence otherwise available, there is no need to resort to the requirements of Rule 801(d)(1)(B)."[118] The Court stated that the residual exception to the hearsay prohibition "exists for that eventuality."[119] The Supreme Court has provided court-martial practitioners with sound, practical advice. Where the requirements for admission of a prior consistent statement are otherwise lacking, court-martial practitioners should accept and use that advice.

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[114] 39 M.J. 119 (C.M.A. 1994).

[115] *Id.* at 124.

[116] Tome v. United States, 115 S. Ct. 696, 705 (1995).

[117] MCM, *supra* note 5, MIL. R. EVID. 803(24) provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

[118] *Tome*, 115 S. Ct. at 705.

[119] *Id.*

A Practitioner's Guide to Race and Gender Neutrality in the Military Courtroom

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Introduction

In *Batson v. Kentucky*,[1] the United States Supreme Court ruled that peremptory challenges by prosecutors calculated to exclude jurors of the same race as the accused violated the Fourteenth Amendment's Equal Protection Clause.[2] Since *Batson*, the Court has greatly expanded the scope of its Equal Protection analysis to allow objections to racially motivated peremptory challenges regardless of the race of the accused,[3] to civil litigants,[4] and even to peremptory challenges by criminal defendants.[5] Most recently, in *J.E.B. v. Alabama*,[6] the Court extended *Batson* to prohibit litigants from striking potential jurors solely on the basis of gender.

Although the United States Court of Appeals for the Armed Forces (CAAF)[7] has yet to apply the holding in *J.E.B. v. Alabama* to trial by courts-martial, it is likely to do so given the court's previous decisions in *United States v. Santiago-Davila*[8] and *United States v. Moore*.[9] In *Santiago-Davila*, the COMA, in extending *Batson* to the military courts-martial, declared, "[I]n our American society, the Armed Forces have been a leader in eradicating racial discrimination."[10] In *Moore*, the COMA enacted a per se rule that *Batson* is triggered automatically[11] (and defense counsel did not need to make a prima facie showing of racial discrimination) whenever a trial counsel peremptorily challenges a member of a minority accused's racial group.[12] Given the military court's history of sensitivity to matters involving discrimination, an extension of *J.E.B.* to military courts-martial would seem inevitable.

Even before the dust from *J.E.B.* has settled, another *Batson* issue has emerged: That is, will *Batson* be extended to religious-based challenges? State court decisions from Minnesota[13] and Texas[14] have come to opposite conclusions. In *State v. Davis*,[15] the Minnesota Supreme Court expressly rejected an extension of *Batson* to religious-based peremptories.[16] In a

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[1] 476 U.S. 79 (1988).

[2] U.S. CONST. amend. XIV, § 1.

[3] Powers v. Ohio, 499 U.S. 400 (1991).

[4] Edmondson v. Leesville Concrete Co., 500 U.S. 614 (1991).

[5] Georgia v. McCollum, 112 S. Ct. 2348 (1992).

[6] J.E.B. v. Alabama *ex rel.* T.B., 114 S. Ct. 1419 (1994).

[7] On October 5, 1994, the National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, 108 Stat. 2663 (1994), changed the name of the United States Court of Military Appeals (COMA) to the United States Court of Appeals for the Armed Forces (CAAF). The same act changed the names of the Courts of Military Review to the Courts of Criminal Appeals. This article will refer to the title of the court that was in place at the time the decision was published.

[8] 26 M.J. 380 (C.M.A. 1988). In *Santiago-Davila*, the court also held that the government's use of its single peremptory challenge to strike the only panel member of an accused's race raises a prima facie showing of discrimination. *Id.* at 392.

[9] 28 M.J. 366 (C.M.A. 1989).

[10] *Santiago-Davila*, 26 M.J. at 390.

[11] *Batson* requires an objection from defense counsel coupled with a prima facie showing of racial discrimination. This in turn shifts the burden to the prosecution to provide a racially neutral explanation for the exercise of his or her peremptory challenge. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered normally will be presumed to be racially neutral. United States v. Batson, 476 U.S. 79 (1988).

[12] *Moore*, 28 M.J. at 368.

[13] State v. Davis, 504 N.W.2d 767 (Minn. 1993), *cert. denied*, 114 S. Ct. 2120 (1994).

[14] Caserez v. State, No. 1114-93, [1995] 56 Crim. L. Rep. (BNA) 1282 (Tex. Crim. App. Dec. 12, 1994). In *Casarez*, the prosecutor in a sexual assault trial peremptorily excused two black jurors in part because, as members of the Pentecostal Church, they would have difficulty assessing punishment. The Texas Court of Criminal Appeals held that "religious affiliation is not an accurate predictor of juror's attitudes." *Id.* Applying an intermediate standard of heightened Equal Protection scrutiny to religious-based peremptories, the Texas Court of Criminal Appeals urged litigants to question jurors about their beliefs in each particular case making any "reliance upon stereotypical and pejorative notions about a particular religion both unnecessary and unwise." *Id.*

[15] *Davis*, 504 N.W.2d at 767.

[16] *Id.* In *Davis*, the prosecutor used a peremptory challenge against a black juror claiming that, as a Jehovah's Witness, the juror would not be able to sit in judgement of fellow human beings. The defendant also was black. In rejecting the defense's attempt to extend the Equal Protection Clause to peremptory challenges based on religion, the Minnesota Supreme Court ruled that "religious affiliation is not as self-evident as race or gender" and ordinarily inquiries into religious affiliations and beliefs are "irrelevant and prejudicial." *Id.* at 771.

dissent to the Supreme Court's denial of certiorari in *Davis*, Justice Thomas noted, "[G]iven the Court's rationale in *J.E.B.*, no principled reason immediately appears for declining to apply *Batson* to any strike based on a classification that is accorded heightened scrutiny under the Equal Protection Clause."[17]

In light of these matters, trial practitioners must be aware of both race and gender neutrality issues during the voir dire process. This article focuses on how courts determine the validity of proffered "race neutral" explanations, examines how gender and race neutrality considerations under *J.E.B.* and *Batson* affect voir dire practice at courts-martial, and highlights tactical courtroom considerations necessary for the effective exercise of gender and race neutral peremptory challenges by trial and defense counsel.

How Neutral Is Racially-Neutral?

To establish a prima facie case of purposeful discrimination under *Batson* (and arguably under *J.E.B.*), the objecting party must demonstrate that: (1) he or she is a member of a cognizable racial group (or gender); (2) that an opposing party used a peremptory challenge to remove a member of a cognizable racial group (or gender); and (3) that the facts and *any other relevant circumstances* raise an inference that the opposing party used the peremptory challenge to exclude the juror based on that person's race (or gender).[18]

Because of the inherent subjectivity of any *Batson* analysis, trial judges are given great discretion in determining whether the defendant has established a prima facie case of purposeful discrimination. In *Batson*, the Court noted, "We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination of black jurors."[19] In *United States v. Hernandez*,[20] the Supreme Court held that trial courts must consider the "totality of the relevant facts"[21] when evaluating these challenges, specifically recognizing that factual determinations of discriminatory intent must "largely turn on an evaluation of credibility."[22]

The Supreme Court did not provide an exhaustive list of factors for a trial judge to consider in determining whether a party has established a prima facie case of discrimination. However, the courts have recognized that considerations may include the following: disparate impact;[23] repeated strikes against members of the same racial group;[24] the level of minority representation;[25] the race of the defendant, the victim, and the witnesses;[26] the consistency of explanations among similarly situated jurors;[27] questions and statements of counsel during voir dire;[28] the demeanor of the attorney who exercises the challenge;[29] and the trial judge's knowledge of local conditions and counsel.[30]

Trial judges who find that an objecting party has made a valid preliminary showing[31] often have great difficulty assessing the facial validity of proffered "racially neutral" articulations. The Supreme Court broadly defined a racially neutral explanation as an explanation "based on something other than the race of the juror."[32] While the explanations do not have to "rise to the level of justifying exercise of a challenge for

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[17] Davis v. Minnesota, 114 S. Ct. 2120 (1994) (joined by J. Scalia).

[18] Batson v. Kentucky, 476 U.S. 79, 96 (1988).

[19] *Id.* at 98.

[20] 500 U.S. 352 (1991).

[21] *Id.* at 362.

[22] *Id.* at 364.

[23] *Batson*, 476 U.S. at 79. While an explanation may, on its face, be racially neutral (*e.g.* "I do not want people that rent on the jury"), the impact of these motives may disparately impact the racial composition of a jury.

[24] People v. Lann, 633 N.E.2d 938 (Ill. App. 1994); Commonwealth v. Jackson, 562 A.2d 338 (Pa. Super. 1989).

[25] *Lann*, 633 N.E.2d at 938.

[26] *Id.*

[27] United States v. Clemons, 634 A.2d 1205 (D.C. Ct. App. 1993).

[28] *Id.*

[29] United States v. Hernandez, 500 U.S. 352, 365 (1991).

[30] People v. Lann, 633 N.E.2d 938, 939 (Ill. App. 1994).

[31] United States v. Ferguson, 935 F.2d 862, 864 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 907 (1992).

[32] *Hernandez*, 111 S. Ct. at 1866.

cause,"[33] they must be clear and reasonably specific, presenting legitimate reasons that are "related to the particular case."[34] To establish a *Batson* violation, a trial judge must find a racially discriminatory intent or purpose by the offending party.[35] Normally, a trial court's finding regarding the issue of discriminatory intent will not be overturned unless clearly erroneous.[36]

Applying *Batson* has proven especially difficult when counsel offers a facially neutral, but subjective and unverifiable, explanation. While judges are most appropriately positioned to determine the candor of counsel's assertions, when faced with purely subjective or "gut instinct" explanations, judicial determinations become largely an evaluation of the good faith and credibility of the proponent attorney. For example, how does a court deal with a counsel's statement that he or she struck a juror because that juror "has a son about the same age as defendant," "never cracked a smile," "seemed uncommunicative,"[37] "appeared overwhelmed,"[38] or "stared at me throughout voir dire?"[39]

In *State v. Cruz*,[40] the Supreme Court of Arizona noted that "if we hold that a party's assertion of a wholly subjective impression of a juror's perceived qualities, without more, overcomes a prima facie showing of discrimination, *Batson* could easily become a dead letter."[41] In *Cruz*, the Arizona court ruled that a prosecutor's explanations that a Hispanic juror appeared "weak" and "would be led," and that another Hispanic juror was "18 years old, worked twelve hours a day and may lose his job," were insufficient to rebut a prima facie challenge.[42] The court noted that "the protection of the constitutional guarantees that *Batson* recognizes requires the court to scrutinize such elusive, intangible, and easily contrived explanations with healthy skepticism."[43]

In *United States v. Uwaezhoke*,[44] a federal drug prosecution from the United States Court of Appeals for the Third Circuit (Third Circuit), the prosecutor used a peremptory strike to remove a black, single mother living in low income housing. A *Batson* objection was overruled based on the prosecutor's explanation that the juror was a "person that rents, it's a person that may be involved in a drug situation where she lives."[45] While the Third Circuit found disparate impact in this categorization, it held that actual discriminatory intent did not exist. However, the Third Circuit indicated that explanations for strikes that have the potential for disparate impact should be subjected to "special scrutiny."[46]

Batson in Military Courts

Because each party normally is allowed only one peremptory challenge at a court-martial,[47] *Batson*-based objections are less common in military practice than in civilian jurisdictions that allow a greater number of peremptory challenges. However, the relative infrequency of *Batson* objections should not diminish the importance of understanding and applying this area of the law.

In *United States v. Shelby*,[48] a Navy trial counsel exercised the government's peremptory challenge against the sole remaining black member. On defense counsel's objection, the

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[33] Batson v. Kentucky, 476 U.S. 79, 97-98.

[34] *Id.* at 98.

[35] *Hernandez*, 111 S. Ct. at 1866, 1868.

[36] *Id.* at 1871; *accord* United States v. Mojica, 984 F.2d 1426 (7th Cir.), *cert. denied*, 113 S. Ct. 2433 (1993); United States v. Perez, 35 F.3d 632 (1st. Cir. 1994).

[37] *Batson*, 476 U.S. at 106 n.91 (Marshall, J., concurring); *see also* People v. Johnson, 767 P.2d 1047 (Cal. 1989).

[38] State v. Reyes, 788 P.2d 1239 (Ariz. App. 1989).

[39] Smith v. State, 790 S.W.2d 794 (Tx. App. 1990).

[40] 857 P.2d 1249 (Ariz. 1993).

[41] *Id.* at 1252.

[42] *Id.* at 1251. *But see* United States v. Sandoval, 997 F.2d 491 (8th Cir. 1993) (prosecutor's challenge of a black juror from the panel was upheld because she was a cosmetologist, young, and probably did not have a high level of education).

[43] *Cruz*, 857 P.2d at 1253.

[44] 995 F.2d 388 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

[45] *Id.* at 391.

[46] *Id.* at 394.

[47] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 912(g) (1984) [hereinafter MCM]. In federal courts, criminal defendants are allowed ten peremptory challenges and prosecutors are allowed six. FED. R. CRIM. P. 24(b).

[48] 26 M.J. 921 (N.M.C.M.R. 1988).

military judge asked the trial counsel if he had challenged the member on the basis of race.[49] The trial counsel indicated that he had challenged the young officer because "he is an ensign and I want more senior people on the panel."[50] The Navy-Marine Corps Court of Military Review (NMCMR) indicated that while the defense had established a prima facie case of discrimination, the trial counsel's explanation was clear, reasonably specific, neutral, and nondiscriminatory. However, the NMCMR expansively interpreted "seniority" to mean "experience," because less "senior" enlisted personnel remained on the panel after the exercise of the challenge.[51]

In *United States v. Curtis*,[52] a capital case, the court-martial panel consisted of nine officers and six enlisted soldiers. Six members were black. Challenges for cause reduced the panel to four officers and six enlisted persons, including three blacks (one officer and two enlisted). The trial counsel used his peremptory challenge against a black Marine Corps staff sergeant (E-6), who was of the same racial group as the accused. Defense counsel made an objection[53] and, after a recess, the military judge indicated that it would be appropriate for the trial counsel to state the basis for his earlier peremptory challenge. The trial counsel responded as follows:

> My articulation, sir, first of all, in my opinion Staff Sergeant Edwards' responses to the voir dire, while satisfactory, didn't indicate to me to be the kind of member that the government would want on this case and one thing particularly that he said that he would consider this as a learning experience which, in the Government's opinion, that was not the—while not challengeable for cause, that is why the government chose to exercise its peremptory challenge on him.[54]

In analyzing the decision of the trial judge, the NMCMR found little basis to support the defense counsel's claim of even a prima facie showing of discrimination on the part of the prosecution. The NMCMR noted that "[O]ur review of the record likewise reveals nothing said by trial counsel during voir dire that would infer the challenge was racially motivated."[55] Focusing on trial counsel's stated reason, the court concurred with the trial judge's conclusion that while the stated motive may not have been particularly wise, "it was understandable and had sufficient foundation to satisfy Batson."[56]

More recently, in *United States v. Thomas*,[57] where a minority accused was charged with larceny and conspiracy, the trial counsel, prior to exercising his peremptory challenge, specifically noted:

> I hesitate to make this challenge because I would like to note that the accused is black and Gunnery Sergeant (H) is the only black member on the panel; however, he testified along with Lieutenant Colonel (F) that he had been on a panel that acquitted a Marine—as a matter of fact he used the words, "we found him innocent," and he gave a bit of a smile when he said that, for whatever reason, and I would like to use my peremptory challenge on Gunnery Sergeant (H) for these reasons.[58]

Defense counsel objected, noting that a number of other members stated that they had also served on panels that had returned acquittals, and that a member's choice of words should "in no way prohibit him from sitting as a member on this court-martial."[59] Responding to this assertion, the military judge indicated:

> [O]ne doesn't have to have a good reason for a peremptory challenge, one only has to have a non-racial reason. It can be a bad non-racial reason. So even if you are correct and that's a bad reason to get rid of him, I've got to decide whether, despite being a bad reason it's a non-racial reason and that is the only inquiry that the *Batson v. Kentucky* case requires me to make at this point.[60]

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[49] *Id.* at 923.

[50] *Id.*

[51] *Id.* at 924 n.4.

[52] 28 M.J. 1074 (N.M.C.M.R. 1989).

[53] *Id.* at 1091. The trial date in *Curtis* preceded the COMA's decision in Santiago-Davila, 26 M.J. 380 (C.M.A. 1988), extending *Batson* to the military.

[54] *Curtis*, 28 M.J. at 1091.

[55] *Id.* at 1092. The decision in *Curtis* precedes the per se rule of United States v. Moore, 28 M.J. 366 (C.M.A. 1989).

[56] *Curtis*, 28 M.J. at 1092.

[57] 40 M.J. 726 (N.M.C.M.R. 1994).

[58] *Id.* at 729.

[59] *Id.*

[60] *Id.*

The trial judge ultimately overruled the defense objection, finding that "the peremptory challenge was not racially motivated."[61]

In affirming, the NMCMR carefully analyzed both of the reasons that the trial counsel offered for the exercise of his peremptory challenge. In reviewing trial counsel's first stated reason (the member's participation in a previous acquittal), the court closely scrutinized the record of trial (including a pretrial questionnaire)[62] regarding the challenged member's prior court-martial experience, compared and contrasted the military records and combat experiences of Gunnery Sergeant (GySgt) [H] and Lieutenant Colonel (LtCol) [F], and concluded that "an unbiased trial counsel could easily conclude that GySgt [H] was not as desirable a member for the prosecution as LtCol [F]."[63]

Regarding the court-member's "smile," the NMCMR noted that "A trial lawyer's stated reason for exercising a peremptory challenge may include intuitive assumptions that are not fairly quantifiable."[64] The NMCMR also noted that the defense did not attempt to dispute by argument or other testimony the accuracy of trial counsel's observation.[65]

When analyzing *Thomas,* it is important to consider that by articulating two reasons for the challenge (one of which was equally applicable to another member and the other based largely on intuition) the trial counsel in *Thomas* opened a Pandora's box in the courtroom and for the appellate record. The in-depth and detailed review necessary by the appellate court to resolve issues of racial bias in *Thomas* underscores the need for counsel to carefully articulate their motivations for making peremptory challenges. Additional individual voir dire of GySgt [H] probably would have yielded further information supporting trial counsel's peremptory challenge.

In *United States v. Greene*,[66] an Army rape prosecution, the trial counsel also provided two separate reasons[67] for exercising his peremptory challenge against a minority member: (1) his concerns that the member may harbor some resentment against him because of some sentencing based questions posed during individual voir dire, and; (2) because the member was "from the Republic of Panama."[68] In response to the military judge's request for clarification of this puzzling statement, the following colloquy ensued:

> TC: He (the member) grew up in the Republic of Panama. Having just finished three years there as a defense counsel, I noticed different attitudes towards certain offenses. One of these types of offenses being sexual offenses. That was another reason why I exercise(d) my peremptory challenge against Sergeant First Class Goode.
>
> MJ: What kind of attitude are you talking about?
>
> TC: Well, the Latin macho type of attitude which I think a lot of males in Panama still have; what we would call "a macho type of attitude," and that spills over into the sexual arena. Males are entitled to more, entitled to sex in some ways, and they go further in attempting to get sex than perhaps you or me would consider standard.[69]

The military judge, noting the member's reluctance to respond to the judge's own questions during voir dire, ruled the initial justification provided by the prosecutor was a substantially nonracial, gender-neutral[70] explanation for challenging that member, especially when considered as a basis solely for a peremptory challenge.[71] The military judge did not apparently respond (on the record) to the trial counsel's comments regarding Panamanian men.

In assessing the racial neutrality of the trial counsel's explanation in *Greene,* the COMA focused on "whether an explanation based on multiple reasons, one of them patently

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[61] *Id.*

[62] *Id.* at 732.

[63] *Id.* at 733.

[64] *Id.* at 730.

[65] *Id.*

[66] 36 M.J. 274 (C.M.A. 1993).

[67] *See also* United States v. Dawson, 29 M.J. 597 (A.C.M.R. 1989) (trial counsel provided three reasons for exercising his peremptory challenge against a minority female officer (of the same race as the accused): (1) educational background in criminal law; (2) junior status on the panel; and (3) lack of experience).

[68] *Greene,* 36 M.J. at 274.

[69] *Id.* at 277.

[70] *Greene* precedes the Supreme Court's decision in J.E.B. v. Alabama, 114 S. Ct. 1419 (1994).

[71] *Greene,* 36 M.J. at 277-78.

impermissible, the other one permissible, satisfies *Batson*."[72] Setting aside the conviction and ordering a rehearing, the COMA expressly held, "An explanation, which includes in part a reason, criterion, or basis that patently demonstrates an inherent discriminatory intent, cannot reasonably be deemed race neutral."[73]

The COMA's decision in *Greene* makes specific reference to several federal appellate decisions[74] in which those courts stressed the necessity of additional circumspection and, if necessary, adversarial hearings to determine a prosecutor's "true motivation."[75] The COMA made reference to—but rejected—a method of analysis articulated by the United States Court of Appeals for the Eighth Circuit in *United States v. Iron Moccasin*.[76] *Iron Moccasin* held that the acceptance of one valid motivation removes any necessity for the further examination of others.[77] The COMA instead followed the stricter ("taint free") standard of *United States v. Briscoe*,[78] a decision from the United States Court of Appeals for the Seventh Circuit, for the holding that "the governments's explanation must be clear and reasonably specific and set forth legitimate reasons for the challenges, *all of which must be related to the particular case to be tried.*"[79]

In *United States v. Woods*,[80] a recent Army case bearing some similarity to *Greene*, the trial counsel used his peremptory challenge against a member with a Hispanic surname. On defense counsel's objection trial counsel indicated as follows:

> We just did not get the feeling that SSG Perez was paying attention and would—be a good member for this panel. It had nothing to do with the fact that his last name was Perez. *I mean there is no drug stereotype here.*[81]

On appeal, the United States Army Court of Military Review (ACMR), in upholding the trial court's rejection of the *Batson* challenge in *Woods*, noted that "although it would have been helpful to review a more articulate and detailed justification, we will not impose such a burden on the facts in this case."[82]

Unfortunately, the decision fails to focus on the fact that while the stated reason is racially neutral, trial counsel's allusion to "drug stereotypes" casts a potential racial shadow over the appellate record. This is exacerbated by an explanation for a peremptory challenge (lack of attention) that is clearly the type of elusive, easily contrived, subjective, and unverifiable explanation which invited "healthy skepticism" in *Cruz*[83] and "special scrutiny" in *Uwaezhoke*.[84] "Healthy skepticism" and "special scrutiny" in this case, arguably, should have led either to a prompt resolution by the trial court of concerns about racial stereotyping, or, in the alternative, to an appropriate denial of the peremptory challenge.[85]

J.E.B. and Gender Neutrality

In *J.E.B. v. Alabama*,[86] a child paternity and support case, the State of Alabama used nine of its ten peremptory challenges to remove male jurors. Despite the *petitioner* using all but one of his strikes to excuse females from the same panel, the resulting jury was made up solely of women. In determining that intentional discrimination on the basis of genders vio-

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[72] *Id.* at 280.

[73] *Id.*

[74] *Id.* at 281; *see* Williams v. Chrans, 957 F.2d 487 (7th Cir.), *cert. denied*, 113 S. Ct. 595 (1992); United States v. Clemons, 941 F.2d 321 (5th Cir. 1991); United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987).

[75] *Greene*, 36 M.J. at 281.

[76] 827 F.2d 226 (8th Cir. 1989). *See also* United States v. Senkowski, 986 F.2d 24, 30 (1993) (holding that peremptory challenges motivated only in part by race do not violate Equal Protection if the prosecutor can show that he or she would have exercised peremptory challenges for race neutral reasons as well).

[77] *Iron Moccasin*, 827 F.2d at 226; *see also* United States v. Sandoval, 997 F.2d 491 (8th Cir. 1993) (race may play a role in peremptory challenges so long as it is not a predominant factor); *Senkowski*, at 30 (peremptory jury strikes motivated only in part by race do not violate the Equal Protection Clause); Lingo v. State, 437 S.E.2d 463 (Ga. 1993) (when multiple race-neutral reasons are given, all need not be applied across the board).

[78] 896 F.2d 1276, 1287 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990).

[79] *Greene*, 36 M.J. at 274 (emphasis added).

[80] 39 M.J. 1074 (A.C.M.R. 1994).

[81] *Id.* at 1075 (emphasis added).

[82] *Id.* at 1076.

[83] United States v. Cruz, 857 P.2d 1249 (Ariz. 1993).

[84] United States v. Uwaezhoke, 995 F.2d 388 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 920 (1994).

[85] "Be it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, it is a willing participant in a scheme that could undermine the very foundation of our system of justice—our citizen's confidence in it." Georgia v. McCollum, 112 S. Ct. 2348, 2393 (1993); "a trial judge need not sit idly by when he or she observes he perceives to be racial discrimination." Brogden v. State, 649 A.2d 1196, 1203 (Md. Ct. Spec. App. 1994).

[86] 476 U.S. 79 (1994).

lates the Equal Protection Clause, the Supreme Court held that "gender, like race, is an unconstitutional proxy for juror competence."[87] The Court also held that "gender based classifications require an exceedingly persuasive justification in order to survive constitutional scrutiny."[88]

J.E.B. followed previous cases extending *Batson* to gender-based challenges in the United States Court of Appeals for the Ninth Circuit (Ninth Circuit)[89] and in Maryland.[90] In *United States v. Omoruyi*,[91] one of a series of Ninth Circuit cases contesting gender based peremptory challenges prior to *J.E.B.*, the prosecutor followed his first peremptory challenge against an unmarried white female by challenging a single black woman. On objection and in response to the court's request for an explanation, the prosecutor indicated that he exercised the peremptory against the black female because "she was a single female and my concern, frankly, is that she, like the other juror I struck, is single and given the defendant's good looks, could be attracted to the defendant."[92] Although the trial judge suggested the government use "a little better standard"[93] it denied the defendant's motion and upheld the strike.

In *Omoruyi*, the government argued on appeal that the focus of the strike was on the juror's marital status,[94] not gender. The government also noted that the prosecuting attorney had allowed six women to remain on the jury and failed to use four remaining peremptory challenges. The appellate court ruled that despite this information, the peremptory challenge was based solely on gender and was on its face discriminatory.[95]

Military Decisions Involving Gender-Based Challenges

Two military cases preceding *J.E.B.* raised the issue of gender during the voir dire process. In *United States v. St. Fort*,[96] the trial counsel exercised his peremptory challenge against the only black member, Captain (CPT) *T*. The member in question also was the only female member on the panel. The military judge sua sponte required the trial counsel to state the basis for his challenge. Trial counsel indicated that CPT *T* was the most junior member and he "had a little concern that [CPT *T*] might have undue empathy with [appellant's] wife."[97] Trial counsel also added that, from his prior experience with CPT *T*, she was "a little too sympathetic" towards those accused of crimes.[98] Appellant argued on appeal that trial counsel's actions constituted gender-based discrimination, were not supported by voir dire, and were not substantially related to the case.[99]

The ACMR, without addressing the issue of gender discrimination, held that trial counsel's explanation was "reasonable, credible, and racially neutral."[100] The ACMR further added that "there is no requirement that a prosecutor's reason be supported by the record of voir dire."[101]

In *United States v. Cooper*,[102] a homicide prosecution, the prosecutor exercised his peremptory challenge against a CPT Brown; one of two black members and the only female member. In response to the trial court's inquiry as to whether the trial counsel's challenge was racially motivated the trial counsel stated:

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[87] *Id.*

[88] *Id.*

[89] United States v. DeGross, 960 F.2d 1433 (9th Cir. 1992). The United States Court of Appeals for the Fifth Circuit declined to extend *Batson* to gender-based peremptory challenges prior to *J.E.B.*; *see* United States v. Brousard, 987 F.2d 219 (5th Cir. 1993).

[90] Tyler v. Maryland, 623 A.2d 648 (Md. 1993).

[91] 7 F.3d 880 (9th Cir. 1993).

[92] *Id.* at 881.

[93] *Id.*

[94] *See* United States v. Nichols, 937 F.2d 1264 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 989 (1992).

[95] *Omoruyi*, 7 F.3d at 884.

[96] 26 M.J. 764 (A.C.M.R. 1988).

[97] *Id.* at 764.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 766.

[102] 30 M.J. 201 (C.M.A. 1990).

> I would specifically note that Command Sergeant Major Williams is black so we have not denied the accused of having [sic] a panel of different races and creeds and the prosecution has taken into consideration what it knows about CPT Brown's prior duty experience, current duty position, has had an opportunity to review her [Officer Record Brief] and her forms 2 and 2-1 and, taking those things into consideration, we exercise our right to peremptorily challenge somebody that . . . to bring the court down to a certain number we want or for whatever reason.[103]

After this rambling explanation, the military judge asked the prosecutor to declare, unequivocally, that he was not exercising his peremptory challenge because CPT Brown was black or female. The prosecutor indicated this was correct, but the judge, apparently still concerned with the prosecutor's responses, inquired as to whether the trial counsel considered either factor in his decision. The trial counsel indicted that "the fact that she is black, none whatsoever."[104] And as the question regarding whether the trial counsel had considered the member's sex in making the peremptory challenge, he responded as follows:

> Marginal—just considering what outlook she might present to this case, what her experiences might be as they relate to the evidence the government knows will be put forth here, that I reiterate, the fact that she is a woman is just marginally . . . what we're really relying on is what all know about her current duty position, past experience in the Army, i.e. [sic], her worldly experience.[105]

In upholding the ACMR's decision, the COMA, while noting the lack of specificity in the trial counsel's explanation, found it to be racially neutral.[106] In a footnote, the COMA, while noting that it "need not decide whether a challenge based on CPT Brown's sex could be sustained,"[107] echoed the ACMR's findings indicating that trial counsel's "later statements support a strong inference that the challenge was based on her known proclivities as an individual and *not on gender*."[108]

In *Cooper* and *St. Fort,* neither the COMA nor the ACMR specifically stated that *Batson* does not apply to gender-based discrimination in military courts. Neither of the appellate courts attempted to correct trial judges for inquiring of trial counsel if "gender" played a role in their decision to exercise peremptory challenges.

Trial Practice Issues

While many view *Batson* and its progeny as inevitably leading to the "death knell" of peremptory challenges,[109] others view the actual mandate of these cases much differently. They emphasize that, "voir dire must be comprehensive and extensive enough to ensure that litigators have ample information about the venire to make rational peremptory challenges without resorting to stereotyping people by race or gender."[110]

Counsel also must understand that in the face of a *Batson*-based objection, peremptory challenges no longer may be exercised without a stated reason, or without additional inquiry and judicial control. Counsel must be able to recognize and articulate specific attributes in a juror that cause concern. Intuitive hunches, gut instincts, or even guesses about juror demeanor or other intangible concepts serve only as a starting point in the voir dire process. Under these circumstances counsel must craft probing voir dire questions that serve to justify or, ultimately, allay these hunches or gut instincts.

If a juror displays a troubling facial expression or body posture when a defense counsel asks about mental responsibility or reasonable doubt, additional individualized inquiry of that juror would be appropriate and prudent. For example, you might ask this question: "CPT Jones, I noticed your smile when I asked about the defense of mental responsibility. How do you feel personally about the insanity defense? Have you ever felt that the insanity defense is used too often; or that it might be a cop out?"

Jurors typically tell trial attorneys what they perceive to be the "correct" or "best" answer. They are unlikely to confess to prejudices or attitudes that might disqualify them as members. Open-ended questions, designed to elicit more thoughtful and deliberative responses are the key to effectively exorcising a juror's hidden "demons." For example, counsel

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[103] *Id.* at 202.

[104] *Id.*

[105] *Id.* at 203.

[106] *Id.* at 204.

[107] *Id.* at 203 n.1.

[108] *Id.* at 203 (emphasis added); *see also* United States v. Cooper, 28 M.J. 810, 812 n.3 (1989).

[109] Jere W. Moorehead, *When a Peremptory Challenge Is No Longer Peremptory: Batson's Unfortunate Failure to Eradicate Invidious Discrimination in Jury Selection* 43 DEPAUL L. REV. 625 (1994).

[110] J. Vincent Aprile II, *More Extensive Voir Dire: A Supreme Court Mandate?,* CRIM. JUST., Fall 1994, at 20.

should consider the following open-ended questions during voir dire:

How do you *feel* about (issue/subject)?;

What would you *think* if (contingency)?;

What about (subject/issue/concept) *is important* to you?;

What does (legal term) *mean* to you?;

As a commander, *what considerations* do you take in (imposing Article 15 punishment/other decision making)?;

What did you *mean* when you said (prior statement or response to questionnaire)?;

What types of *experiences* have you had with (subject matter)?;

What else do you *think* is important about (subject)?;

Please give me an *example* of (prior experience)?; or,

What were your *impressions* of (person/experience)?"

The assistance of cocounsel to keep track of juror responses, facial expressions, and other nonverbal cues is extremely helpful in making sound challenges and defending those decisions with racially and gender-neutral explanations. It is virtually impossible to ask questions, listen to responses, observe nonverbal cues, and record those responses or observations unassisted. Properly conducted, this "team" approach gives counsel responding to a potential *Batson* challenge additional nonracial or nongender discriminating reasons justifying both peremptory or causal challenges. For example, trial counsel responding to a *Batson* objection by the defense might reveal the following motives:

> Your honor, Lieutenant Jones, in response to my question about consent to sexual relations said, and I quote, "as far as I am concerned, it's usually the woman's obligation to tell a man no." Furthermore your honor, just a couple minutes later, Lieutenant Jones crossed his arms and had a smirk on his face when I asked Major Smith, a female officer, the same question during group voir dire."

It also is important to understand that while *Batson* and *J.E.B.* prohibit discrimination in the exercise of peremptory challenges, counsel are not prohibited from asking relevant questions about a member's personal opinions, life experiences,[111] or *individual* feelings as they might relate to race or gender. For example, in a case that involves cross-racial parties and victims, trial counsel might ask, "Major Smith, as an African-American and an Army officer, how do you personally feel about mixed-race dating?;" or, "Sergeant First Class Jones, as a senior noncommissioned officer and as a woman, how do you feel about the possibility of sitting in judgement of an accused rapist?"

However, when counsel make this type of inquiry, they *must* convey the deepest sensitivity and respect to the court member in question. Carefully crafted, open-ended follow-up questions, designed to elicit personal experiences or deeply seated emotions require the utmost in preparation and tact. Prior planning (with both peer and supervisory review) is essential if counsel considers this type of inquiry.

Defense counsel must remain alert to potential *Batson* issues and be prepared to make timely and appropriate objections. Unless discrimination is inherent in a challenge, trial judges require clear and contemporaneous objections by opposing counsel.[112] Appellate courts expect more of advocates than ill-timed and half-hearted objections. With only one peremptory challenge per side, articulating valid objections and establishing a prima facie basis for these objections can be more difficult in military tribunals.

Trial attorneys should be aware of potential "warning flags" in the exercise of peremptory challenges by opposing counsel. These may include logical inconsistencies in voir dire examinations, weak or perfunctory individual voir dire, the failure to exercise a challenge for cause against a minority or female member prior to seeking a peremptory challenge, disparate treatment, or ambiguous or insensitive statements made by counsel regarding a minority or female member.

Counsel should not forget the per se discrimination rule of *United States v. Moore*,[113] when opposing counsel challenges a minority member of the same race as the accused. Nor should counsel forget to argue the "totality of the circumstances" standard of *United States v. Hernandez*[114] when making a *Batson*-based objection to a peremptory challenge. Counsel never should be reluctant to follow up on their objec-

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[111] Barbara Franklin, *Gender Myths Still Play a Role in Jury Selection*, NAT'L L.J., Aug. 22, 1994, at A1.

[112] United States v. Shelby, 26 M.J. 921, 922 n.2 (N.M.C.M.R. 1988); *see also* United States v. Pulgarin, 955 F.2d 1 (1st Cir. 1992).

[113] 28 M.J. 366 (C.M.A. 1989).

[114] 500 U.S. 352, 362 (1991).

tions with demands for additional clarification if necessary.[115] Follow up is especially important in the face of subjective or unverifiable explanations that are not supported by prior inquiry by opposing counsel during group or individual voir dire.

Trial counsel may wish to heed the counsel of Judge Cox in his concurring opinion in *United States v. Santiago-Davila,*[116] "[A]lthough the government enjoys a peremptory challenge, sound practice would suggest using it sparingly and only when a challenge for cause has not been granted."[117] This approach greatly reduces the possibility of error during the voir dire process, especially by junior counsel with little trial experience.

Because research indicates that likelihood of self-disclosure by jurors increases if they do not have to speak in front of other jurors,[118] defense and trial counsel should consider the opportunity provided under Rule for Courts-Martial (RCM) 912(a)(1)[119] to submit written questionnaires to members. While RCM 912(a)(1) lists eleven specific areas of inquiry (for example, sex, race, marital status, home of record, dependents, assignments), subsection (a)(1)(K) of the rule allows inquiry into other matters "with the approval of the military judge."[120]

In *United States v. Loving,*[121] each member completed a questionnaire consisting of thirty-five questions covering "personal and family history, civilian and military education, past duty assignments, non-military employment, awards and decorations, volunteer work, previous contacts with the legal system, hobbies, memberships in organizations, and reading habits."[122] Responses to questionnaires are a valuable source of information for determining member qualifications and for preparing individualized voir dire questions.

For military judges, when explanations offered for peremptory challenges are as elusive and subjective as those proffered in *Thomas*[123] (a "smile"), or *Curtis*[124] ("learning experience"), or, when counsel provides a "bad reason," arguably, trial judges should require counsel to provide more objective responses. In *Greene,*[125] the COMA spoke of the necessity of discovering counsel's "true motive."[126] Imposing such a standard requires that the trial judge scrutinize the voir dire process more closely and that counsel conduct a more thorough and professional voir dire.

When a member provides an ambiguous verbal response, counsel should merely follow up and inquire of the member, "Sergeant Edwards, when you said sitting as a member in this case would be a 'learning experience' for you, what did you mean by that?" If counsel notices a telling nonverbal reaction to a question, counsel simply could ask, "Lieutenant Jones, I couldn't help but notice that you smiled when you said you found the accused innocent in the previous court-martial; why was that?" Opposing counsel also must be alert for these potentially ambiguous comments or other "loose ends" that often require little more than simple follow-up questions to resolve.

In his concurring opinion in *Greene,* Judge Wiss noted that "[c]ourts of law may not be able to cure the personal bedevilment of racial prejudice; but courts can and must ensure that such human bigotry and insensitivity do not rot public and governmental institutions."[127]

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[115] There is no per se requirement that a court reject a prosecutor's explanation simply because it rests in part on lack of knowledge, although such explanations "might warrant extra caution on the part of the trial judge and reviewing court." State v. Harris, No. 73899 (Ill. Sup. Ct. Dec. 22, 1994).

[116] 26 M.J. 380 (C.M.A. 1988).

[117] *Id.* at 393.

[118] Lin S. Lilley, *Techniques for Targeting Juror Bias,* TRIAL, Nov. 1994, at 41. Evidence indicates that one in three prospective jurors will admit in a questionnaire to knowing someone who was sexually abused, while only one in ten will do so in open court.

[119] MCM, *supra* note 47, R.C.M. 912(a)(1).

[120] *Id.* R.C.M. 912(a)(1)(K).

[121] 41 M.J. 213 (C.M.A. 1994).

[122] *Id.* at 255. It has been reported that the questionnaire in *California v. O.J. Simpson* was 80 pages long and consisted of 294 questions. Questions included: "Have you ever asked a celebrity for an autograph"; "What do you think is the main cause of domestic violence"; "Have you or anyone close to you undergone an amniocentesis?"; and "Have you ever dated a person of a different race?" Jeffrey Tobin, *Juries on Trial,* NEW YORKER, Oct. 31, 1994, at 42.

[123] United States v. Thomas, 40 M.J. 726 (N.M.C.M.R. 1994).

[124] United States v. Curtis, 28 M.J. 1074 (N.M.C.M.R. 1989).

[125] United States v. Greene, 36 M.J. 274 (C.M.A. 1993).

[126] *Id.* at 282.

[127] *Id.* at 282, 283.

Media Coverage of Military Operations: OPLAW Meets the First Amendment

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Introduction

Today's military and members of the news media suffer a strained relationship. Military officers often view the news media with attitudes that range from grudging tolerance to contempt. "Let me say up front that I don't like the press," an Air Force officer began a press briefing during Operation Desert Storm. "Your presence here can't possibly do me any good, and it can hurt me and my people. That's just so we know where we stand with each other."[1] Those words reflect an attitude typical of many military leaders—and one that stands as a barrier to effective media relations.

Conversely, news reporters often regard the military with skepticism and mistrust. Many reporters formed attitudes in the wake of the Vietnam War, when many people viewed the military with suspicion. Journalists sometimes suspect that uniformed officers have a vested interest in promoting warfare. Thus, journalists sometimes impose mental barriers to effective news coverage. However, because public support for military operations is critical to sustain an extended war effort, the existing chill in media relations must be thawed to ensure that the military will be able to tell its story.

While recent history may be largely responsible for the cooling off of relations between the military and the press, institutional factors—such as commercialism, competitiveness, and operational security—also contribute to the military's media relations problem. To improve media-military relations, judge advocates should recognize and understand these factors so that when they arise they do not allow them to create an insurmountable barrier to effective communication between the military and the media. When advising commanders regarding media relations, judge advocates must counsel patience.

Many observers regard the media relations program carried out during the Persian Gulf War as a success on the part of the military.[2] However, the media has not shared the military's enthusiasm for the media relations effort. News media organizations have sharply criticized the Desert Shield/Storm public relations effort as chilling candid coverage of the war.[3] The media relations effort included a system of pool reporting, in which representatives of various media would receive battlefield access with the requirement that they share their reports and security reviews of reports. Legal critics have argued that the media relations effort violated a media right to access to the battlefield and constituted a prior restraint.[4]

However, the media relations efforts by the military during the Persian Gulf War were constitutionally sound.[5] Further, while censorship normally would constitute an unconstitutional prior restraint of information, media representatives can agree to security reviews of reports as a tradeoff for inclusion in press pools. Therefore, the security reviews conducted during the Gulf War were proper. However, operational security normally should be the only reason for blocking media access to an operation or to information.

Media relations during the Persian Gulf War perhaps were not the resounding success that the military public affairs sector has proclaimed. The Gulf War effort was over quickly, and casualties were minimal. Had the war lasted longer and caused more casualties, the media relations effort might have been increasingly problematic.[6] The coverage, which was largely supportive of Gulf War efforts, might have turned negative. Continued strict press restrictions might have marred the public's perception of war efforts and could have led to Congress imposing less flexible media relations rules.[7] Military leaders must realize that the media will be a substantial part of every war effort. Judge advocates must be aware that

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[1] Machamer, *Avoiding a Military-Media War in the Next Armed Conflict*, Apr. 1993, MIL. REV. at 43, 44-45.

[2] *Id.* at 43.

[3] *Id.*

[4] *See, e.g.*, Comment, *The Persian Gulf War and the Press: Is There a Constitutional Right of Access to Military Operations*? 87 NW. U. L. REV. 287 (1992) [hereinafter *Right of Access*]; Note, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 STAN. L. REV. 675 (1992) [hereinafter *Press Restrictions*].

[5] *Cf.* Nation Magazine v. United States Dep't of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

[6] Machamer, *supra* note 1, at 46.

[7] During the Persian Gulf War, several members of Congress initiated inquiries into the press pool and security review procedures followed by the military. Gersch, *Senate to Begin Hearings on Media Access to War News*, EDITOR & PUBLISHER, Feb. 16, 1991, at 9.

although the First Amendment does not provide the media with unfettered access to the battlefield, judge advocates must be mindful of political, operational, and practical concerns that necessarily arise when the media becomes involved in military operations. Toward that end, media relations pointers identified here may prove helpful.

Events in Somalia illustrate that media relations are important in informing the public of how the military is doing its job. With public opinion sharply divided as to whether the United States should continue participating in Operation Restore Hope, the importance of communicating an accurate picture of operations became paramount during the fall of 1993.[8] Arguably, the media played a significant role in the United States entry into Somalia and also in prompting an early exit.

Barriers to Media Relations

Commanders—and other government officials—often are frustrated that the media does not depict what they feel is an accurate picture of events. This leads to skepticism about the sincerity of the media and a reluctance to share information. However, some of what commanders perceive as news distortion may be the result of institutional factors built into our system of a free press; factors that our military leaders need to understand.

Free press is driven by economics. Newspapers and the electronic media are in business to make money. To make more money, news media must attract readers and viewers. With the written press, the equation is simple:

HIGHER CIRCULATION = MORE ADVERTISING = HIGHER PROFITS

Television news success is similarly tied to viewership. Consequently, the media sometimes overplays sensational stories while ignoring less exciting—and often more important—stories. This result leads military officials to question whether the media is acting responsibly. However, the government has no control over the commercial nature of the media. A commander's best approach is simply to understand that the news media is trying to make money.

When news outlets share markets with others, or when they are competing for national prestige, economic competition can translate into intense news competition. While competition among the news media generally is believed to be desirable, forcing news outlets to aggressively seek out the news has its drawbacks. Among the drawbacks is the driving desire to get the story first. As journalist Tom Wicker wrote:

> Just as the urge to compete—that is, to win— can lead a football player to jump or even slug an opponent in the heat of battle, so the urge to compete—to get ahead—can cause newspapers and broadcasters to breach their standards in ways that would never happen in conditions of calm reflection and unhurried judgment.[9]

As a recent example of this, broadcasters frequently conjectured about what was occurring during the initial air attacks on Iraq during the Persian Gulf War. Their desire to be the first to report certain facts resulted in the dissemination of incorrect information. As the conjecture proved untrue, they had to correct the earlier information.[10]

A related problem is that the media must produce stories every day. "Spiro Agnew himself," Wicker wrote, "never did such damage to the press as dailiness does daily."[11] According to Wicker, the difficulty stems from the vast amount of information with which the media must deal each day. "The . . . problem," he wrote, "is not unlike the proverbial difficulty of putting ten gallons of whiskey into a five-gallon jug."[12] Crises come so quickly, that in their zeal to stay on top of the latest crisis, the media fails to give adequate, in-depth coverage to the last crisis that occurred. The media's desire to produce news each day—and the resultant lack of scrutiny—even has been cited as a major factor contributing to the rise of Joseph McCarthy during the 1950s:

> McCarthy was a fascinating example of the weaknesses of traditional journalistic objectivity . . . reporters could write what he said, and as long as they spelled his name correctly and quoted him correctly, they were objective . . . and objective journalists were considerate enough not to bother him with his record, with what he had said a week, or month, or year before.[13]

Indeed, McCarthy's rise illustrates how commercialism—a desire to sell newspapers or attract viewers—can combine

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[8] *See, e.g.*, Crigler, *Clinton Tries to Steer Middle Course Through Desert Landscape*, BALT. SUN, Oct. 10, 1993, at E1, col. 1.

[9] T. WICKER, ON PRESS 171 (1978).

[10] A glaring example of this was CNN reporter Charles Jaco's declaration, "It's gas!" when an Iraqi SCUD missile struck in the vicinity of Dhahran, Saudi Arabia. He later apologized. *Showdown at "Fact Gap*, NEWSWEEK, Feb. 4, 1991, at 61, 62.

[11] WICKER, *supra* note 9, at 174.

[12] *Id.* at 172.

[13] D. HALBERSTAM, THE POWERS THAT BE 141 (1979).

with dailiness to distort the news. While the McCarthy case was extreme, the same effects frequently occur on a smaller scale.[14]

Another factor that inhibits effective news reporting is that news people have prejudices and biases, and that even the best efforts to be objective may be unsuccessful. Commentators have long recognized that "complete objectivity" does not exist:

> Every newspaper office receives a great deal more news than the paper can carry. By consistently selecting items of news which supported its own policy and omitting others, or by giving more prominence to events and aspects of affairs having this tendency than to others, a newspaper could in an extreme case produce in the minds of its readers an impression totally divorced from the truth. And it could do this while preserving the most meticulous accuracy in its statement of the facts reported.[15]

The news media has the power to create its own concept of reality. Even innocent decisions on what is "news" and what is not can result in distortions of the news.[16] However, military leaders should remember that despite the power of the press, individual reporters normally are just doing their jobs as well as they can. The news judgments that they make are based on values taught in journalism schools and through years of experience.[17]

Another phenomenon that may cause military leaders to mistrust the media is "headline distortion." Taking a complex idea and trying to boil it down to a headline, or a television news short subject, can cause problems. Because not everyone reads entire newspaper stories, headline distortions are a concern. Nor do television viewers always take the time to watch in-depth analysis. Many citizens get a cursory version of the news gleaned from headlines or television. A report on a 1964 speech in Nashville by Mayor Charles Evers of Fayette, Mississippi, exemplifies how misleading headlines can be. He stated, "If the whites don't stop beating and mistreating and burning our churches and killing our brothers and sisters, we're going to shoot back." The subsequent headline in the newspaper then read: "Evers Says Negroes Will Shoot Whites."[18] While that kind of intentional headline distortion is rare, it is less rare for headline writers, when squeezing large amounts of information into a few words, to make mistakes of accuracy. Similarly, with television, complicated subjects might be covered in one or two inadequate sentences on the nightly news.

A problem that the news media has that is unique to war coverage is widespread inexperience. Reporters who cover Congress, executive agencies, and the judiciary do so permanently, and consequently, develop an understanding for their institutions. Observers have stated that reporters who cover a particular beat for a long time begin to grant deference to officials on the beat.[19] Because reporters depend on those officials for information, they tend not to unnecessarily "burn" a source. However, because the United States is not always at war, there are no permanent war reporters. When the nation goes to war, reporters are pulled off of other beats and many of these reporters have little or no experience covering military matters. As a result, they may be ignorant about military operations. "Most of the almost 1,500-member U.S. press corps I saw during Desert Storm couldn't tell a tank from a turtle," one commentator observed.[20] Officers assigned to brief reporters may be required to take more time with reporters to ensure that the information is understood. If briefing officers are too brusque with reporters, then reporters may be forced to seek out unofficial, less reliable sources of information.

The most important factor in the military-media relationship is the way that the government treats the media and vice versa. This can be summed up in two words: attitude and access. That some commanders and news people sometimes dislike and distrust each other might be the biggest barrier to effective communications between the military and the media. Most reporters are conscientious and patriotic, although often naive about military matters.[21] Reporters generally are not conniving scoundrels, nor are uniformed officers one-dimensional hawks.

Much of the military's perception of the news media was based on the Vietnam War, during which the media enjoyed an almost unrestrained access. Numerous writers blamed the

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[14] An example of this was Peter Arnett's television news reporting from Baghdad during Operation Desert Storm. To CNN's credit, the reports were clearly identified as having been censored by the Iraqi government. However, they serve to illustrate how the media sometimes provides stories of questionable relevance on the belief that keeping information flowing is paramount, even if it is distorted.

[15] P. HOCH, THE NEWSPAPER GAME 91 (1974) (from a report prepared by The First Royal Commission in England, 1949).

[16] *See generally* H. GANS, DECIDING WHAT'S NEWS (1976).

[17] For profiles of the types of reporters that might cover a military operation, *see generally* S. HESS, THE WASHINGTON REPORTERS (1981).

[18] HOCH, *supra* note 15, at 93.

[19] L. SIGAL, REPORTERS AND OFFICIALS 47 (1974).

[20] Hackworth, *Learning How to Cover a War*, NEWSWEEK, Dec. 21, 1992, at 32.

[21] *See generally* HESS, *supra* note 17.

loss of the Vietnam War on unflattering coverage by the media[22] and some writers still attribute the loss of American lives to careless reporting.[23] While the news media may have reported indiscriminately at times during the Vietnam War, the resentment that has built up may be disproportionate to the media's actual offenses, which took place before many of today's reporters had entered the field.[24]

Much of the news media's perception about the military arises from a belief that the military, particularly the officer corps, has a vested interest in promoting war. Because American officers' status is based exclusively on rank, and wartime is perceived as the best time to advance in rank, theoretically, officers would desire war to increase their own status.[25] In addition to this common misconception, the military has at times attempted to control news of its wars and appeared to promote war, which has furthered media distrust.[26] Furthermore, news reporters may not be sympathetic with efforts to withhold information for operations security. Being inexperienced in covering armed conflicts, they might think that revealing information—such as unit morale or location—is harmless. Thus, military efforts to suppress this information may appear as the product of overzealous secretiveness. Further, instances of brusque treatment—exemplified by the Air Force officer's remarks at the Desert Storm press conference—also contribute to the media's negative attitude toward the military.

However, to overcome barriers to communication between the military and the news media, both camps need to abandon these outdated perceptions. Military leaders must develop a deeper understanding of how the media operates. Although commanders may not always agree with the news coverage, they should not impose an impassable barrier between the military and the media as a result.

News Management in the War Zone

Historical Practices

Critics of limiting media access to the battlefield have argued that the military historically has allowed the media access except when prohibited by operations security.[27] However, during the aftermath of the Grenada invasion, Paul G. Cassell argued persuasively that press access to the battlefield has not been the tradition of military-media relations—that the military frequently has imposed limitations on the news media.[28] Furthermore, in an article sharply critical of military restrictions on news coverage, Professor Margaret Blanchard agreed that the restrictions observed during the Gulf War were not unprecedented.[29] "During the Persian Gulf War many Americans felt as if they were experiencing something new in terms of suppression of dissent, restrictions on reporters, manipulation of information and the like," she wrote. "[S]uch an assessment of the situation could not be farther from the truth."[30]

According to Cassell, during the Revolutionary War there was no distinct press corps engaged in war reporting. Newspapers relied on "the chance arrival of private letters and of official and semi-official messages" for coverage.[31] "[I]f letters from the front constitute journalistic presence at combat operations," Cassell wrote, "then a journalistic presence existed in Grenada, since soldiers who fought there subsequently published accounts of the battle."[32] This lack of an organized press corps of war correspondents continued through the War of 1812.[33]

During the Mexican-American War of 1846-47 the modern war correspondent first emerged.[34] During that conflict, newspaper reporters enjoyed liberal access to combat. How-

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[22] For discussions on whether the media "lost" the Vietnam War, *see* W. SMALL, TO KILL A MESSENGER (1970); *contra* G. MACDONALD, REPORT OR DISTORT? (1973); W. WESTMORELAND, A SOLDIER REPORTS 420 (1976).

[23] *See, e.g., Media on the Battlefield,* SOLDIERS, Oct. 1993, at 21-22 ("some Vietnam-era soldiers take a harsh view of the media, remembering situations when indiscriminate reporting cost soldiers' lives").

[24] *See, e.g.,* SMALL, *supra* note 22.

[25] *Cf.* A. TOCQUEVILLE, DEMOCRACY IN AMERICA 274-80 (R. Heffner ed. 1956).

[26] *See infra* text accompanying notes 27-56.

[27] *See, e.g., Right of Access, supra* note 4, at 287; Note, *Assault on Grenada and the Freedom of the Press,* 36 CASE W. RES. L. REV. 483 (1986) [hereinafter *Assault on Grenada*].

[28] Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars,"* 73 GEO. L.J. 931 (1985).

[29] Blanchard, *Free Expression and Wartime: Lessons from the Past, Hopes for the Future,* 69 JOURNALISM Q. 5 (1992).

[30] *Id.* at 16.

[31] Cassell, *supra* note 28, at 933 (quoting F. MOTT, AMERICAN JOURNALISM—A HISTORY: 1690-1960, 99 (1962)).

[32] *Id.*

[33] *Id.* at 933-34.

[34] *Id.* at 934.

ever, Cassell argued that the line between combatants and correspondents was still blurred; most correspondents went to war primarily as fighters.[35]

The Civil War was the first major American conflict covered by significant numbers of war correspondents.[36] Many reporters were allowed free access to the front lines. However, some generals excluded the press from operations either temporarily or permanently.[37] General Sherman, for instance, discovered that his 1861 operations in Kentucky had been exposed by press reports. He then "banished every newspaper correspondent from the lines, and promised summary punishment to all who should in the future give information concerning his position, strength or movements."[38] Additionally, General Grant regulated the press accompanying his army on the assumption that war correspondents were under the authority of the commanding general.[39] Further, Union officials, including President Lincoln, censored journalists when they deemed it necessary.[40] In the Confederacy, correspondents usually were excluded from the front lines, and the small size of the press corps made it impossible for the southern newspapers to provide full coverage.[41]

During the next major conflict, the Spanish-American War, the military placed few restrictions on the press. However, Cassell observed that instances of censorship as well as exclusion of reporters from combat zones occurred.[42] Additionally, while the press was usually allowed access to limited actions during the period following the Spanish-American War, this was not always the case. For example, General Pershing excluded the press entirely from the Mindoro Island pacification operation in the Philippines.[43]

During World War I, censorship of combat information was widespread, although American allies Britain and France already had established the framework for the censorship.[44] War correspondents had to be accredited and censorship was imposed. "The reporting of significant developments, such as the failure of supplies to reach the [American Expeditionary Force in Europe]," Cassell wrote, "was delayed because the War Department in Washington feared that such stories would shake the nation's confidence in the war effort."[45] For violating censorship rules, a reporter could have his credentials revoked.[46] Additionally, reporters initially were barred from battle lines, although that restriction ultimately was relaxed and reporters were allowed to accompany American forces into battle.[47]

During World War II, censorship was commonplace. An Office of Censorship was created and accreditation was used to enforce censorship. To gain access to the battlefield, a reporter had to agree to submit all his work to military officials for censorship.[48] Censorship during World War II went beyond security concerns to protect sensitive political positions. For example, General Eisenhower temporarily censored political information relating to North Africa to allow negotiations to proceed "without concurrent public speculation."[49] At other times information was held back because it was embarrassing or discouraging.[50] In exchange for censorship, reporters were given "fairly wide," although not unlimited,

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[35] *Id.*

[36] *Id.*

[37] *Id.* at 935.

[38] *Id.* (quoting Randall, *The Newspaper Problem in Its Bearing upon Military Secrecy During the Civil War*, 23 AM. HIST. REV. 303, 307 (1918)).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 936 (during this period, former *New York Tribune* reporter Grant Squires "earned the bitter dislike of most of the newspaper men" while acting as official military censor.)

[43] *Id.* at 936-37.

[44] *Id.* at 937.

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 939.

[50] *Id.* The radio transmitter reporters used at Anzio was shut down because the broadcasts suggested that the landing might result in defeat. Reporters covering General MacArthur in the Pacific "were not permitted to find fault with anything—strategy, tactics, morale, food, supplies, or, above all, the theater's commander in chief." (quoting M. MANCHESTER, AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964, 359 (1978)). *Id.*

access.[51] However, the press was barred from several major battles, such us Midway and the Battle of the Bulge.[52]

During the Korean War, "correspondents were placed under the complete jurisdiction of the army, and for any violation of a long list of instructions they could be punished by a series of measures beginning with a suspension of privileges and extending, in extreme cases, to deportation or even trial by court-martial."[53] Censorship was so tight, one newspaper wrote, "that it was no longer officially possible to say anything about United Nations troops other than that they were in Korea."[54] General MacArthur, who was in command of Korean operations, expelled seventeen reporters for violating the strict rules.[55] However, after MacArthur was relieved, the censorship policies were relaxed, and the press was allowed considerable access to battlefield operations throughout the remainder of the war.[56]

The Vietnam War represented the high water mark of press freedom on the battlefield. Reporters had virtually unrestricted access to the battlefield and were required to observe only minor ground rules.[57] However, during the Vietnam War military-media relations deteriorated the most. Observers have stated that while war correspondents traditionally had served as partners of the military, press boosterism declined during the Vietnam War. The military began to see the press as unpatriotic and reckless with the facts while the press began to mistrust military accounts of operations.[58]

The press was not a part of the invasion of Grenada in 1983. Reporters were kept off the island for two days following the initial invasion.[59] The media was outraged, and *Hustler* magazine publisher Larry Flynt took the government to court.[60] He sought a declaratory judgment and injunctive relief, but the case was dismissed as moot. The district court held that the case did not meet the requirements of the "capable of repetition, yet evading review" exception to the mootness rule, because there was no "reasonable expectation" that the controversy would recur.[61] The court further explained that even if the case was a live controversy the court would not issue an injunction. An injunction "would limit the range of options available to the commanders in the field in the future, possibly jeopardizing the success of military operations and the lives of military personnel and thereby gravely damaging the national interest."[62]

A result of the media dissatisfaction with the Grenada invasion, the "Sidle Panel" was formed and chaired by retired Major General Winant Sidle. The Panel included representatives from journalism schools, the media, and the military. The Panel's report urged the military to conduct planning for media coverage concurrently with operational planning, devise a reporter accreditation system, urge voluntary compliance with established ground rules, and develop a system of press pools.[63] The Sidle Panel established general principles—not specific regulations—that theoretically direct the military's press relations efforts today.

Although the press pool was activated during Operation Just Cause in Panama in 1989,[64] the Persian Gulf War was the first major conflict to employ the press pool system. Media relations during the Gulf War also involved security reviews of written news reports of pool members. Although military spokesmen have conceded that some military commanders slowed publication of stories or suggested changes that did not involve security concerns, they maintain that these were exceptions that did not reflect official policy.[65] Ground rules during the Persian Gulf War established restrictions on how

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[51] *Id.*

[52] *Id.* at 940.

[53] *Id.*

[54] *Id.* at 941.

[55] *Id.*

[56] *Id.*

[57] *See Press Restrictions*, *supra* note 4, at 683-84.

[58] *Id.* at 684.

[59] *Id.*

[60] Flynt v. Weinberger, 588 F. Supp. 57 (D.D.C. 1984).

[61] *Id.* at 59.

[62] *Id.* at 60.

[63] Cassell, *supra* note 28, at 946.

[64] Commentators have criticized the military for activating the press pool too late to cover the most important hours of the Panama invasion. *See, e.g., Press Restrictions*, *supra* note 4, at 685.

[65] *Id.* at 688.

the press could identify units and geographical locations and instituted prohibitions on reporting certain types of information.[66]

The media was upset about the restrictions that the military placed on it during the Gulf War.[67] Prior to the conflict, the trade journal *Editor & Publisher* argued that press restrictions would result in "very little, if any, individual initiative and original reporting. The American people will be the losers."[68] During the war, one reporter was quoted as saying, "If you sit around waiting for the scraps to be fed to you, you're going to get the kind of things a dog gets: leftovers."[69]

Perhaps as a result of the military's media controls, some reporters chose to flout military press restrictions by striking out on their own.[70] On January 21, 1991, the vehicle of CBS Newsman Bob Simon, producer Peter Bluff, cameraman Roberto Alvarez, and soundman Juan Caldera was found near the Saudi-Kuwaiti border, with footprints leading toward Kuwait.[71] Simon and his party were captured and imprisoned by the Iraqis for more than six weeks. After the war, Simon said that the Iraqis had fed him only one meal a day of bread and thin soup, beaten him, and accused him of being a spy. At a press conference Simon stated, "I think I'll cover wars again, but it'll never be the same . . . a certain child sense of invulnerability, it's gone and I'll never get it back."[72] Other journalists opted to avoid military press rules and at one point as many as twenty-eight were thought to be missing.[73]

During the Gulf War, because of the press restrictions, members of the media brought an action against the military and sought declaratory judgment and injunctive relief.[74] *Nation Magazine* and others maintained that the pooling regulations violated the First Amendment by inhibiting news gathering. Security review procedures were not challenged in the suit. The government moved to dismiss, stating that the plaintiffs lacked standing to raise the issue, that under the political question doctrine the court should decline to reach the merits of the case, and that the end of the war rendered the controversy moot.[75]

The court rejected the government's standing argument—that none of the plaintiffs had suffered actual harm—because one of the plaintiffs had been excluded from a pool.[76] The court rejected the government's political question argument, because the treatment of the press only had an incidental relationship to American policy toward other nations.[77] The court determined that the plaintiffs also met the "capable of repetition, yet evading review" test, and declined to dismiss the case as moot.[78] However, the conclusion of the war rendered the claims for injunctive relief moot.[79] The court also declined to grant declaratory judgment, stating:

> Since the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation.[80]

Following the military's tight controls over the news media during Operation Desert Storm, Operation Restore Hope in Somalia provided a sharp contrast. "During Desert Storm, press officers treated reporters as the enemy and kept them pinned down. This time the brass gave away every detail of Operation Restore Hope: mission, assault beach, objectives, troop strengths, even commanders' names. . . . When the

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[66] Machamer, *supra* note 1, at 51.

[67] *Id.* at 43-44.

[68] *See, e.g.*, Editorial, *Pentagon Rules*, EDITOR & PUBLISHER, Jan. 12, 1991, at 9.

[69] Zoglin, *Jumping Out of the Pool*, TIME, Feb. 18, 1991, at 39.

[70] *Id.*

[71] Gersch, *Press Pools on the Verge of Collapse?*, EDITOR & PUBLISHER, Feb. 2, 1991, at 7.

[72] Gersch, *Missing in Iraq*, EDITOR & PUBLISHER, Mar. 9, 1991, at 7.

[73] *Id.*

[74] Nation Magazine v. United States Dep't. of Defense, 762 F. Supp. 1558 (S.D.N.Y. 1991).

[75] *Id.* at 1561.

[76] *Id.* at 1565-66.

[77] *Id.* at 1566-68.

[78] *Id.* at 1569.

[79] *Id.* at 1569-70.

[80] *Id.* at 1572.

press corps beats the Marine Corps to the beach, everybody loses."[81] When the Marines penetrated Somalia in the face of glaring camera lights, many speculated that the news media prompted the entire operation—that media attention to the starvation in Somalia forced the United States to intervene.[82] But there can be little question that the vivid images of the mutilation of American soldiers' bodies some ten months later had much to do with the United States early withdrawal from Somalia. After the costly fire fight in Mogadishu on October 3, 1993, news coverage of the Somalia intervention turned overwhelmingly negative.[83] Six months later, all United States troops withdrew.

The Right of Access

Commentators have argued that the media has a constitutional right of access to the battlefield and that the pool reporting system established for the Persian Gulf War violated that right.[84] Perhaps the most important case lending credence to the right of access is *Branzburg v. Hayes*,[85] in which the United States Supreme Court acknowledged that "protection for seeking out the news" was critical to First Amendment freedom of the press.[86] *Branzburg* nevertheless held that a reporter could be compelled to reveal a confidential source to a grand jury, reasoning that the government has a compelling interest in investigating crimes.[87]

However, whatever encouragement that *Branzburg* may have provided for a right of access suffered a setback, following a series of cases involving press access to prisons and jails. In *Pell v. Procunier*[88] and *Saxbe v. Washington Post*,[89] the Court held that the Constitution does not require the government to accord the press special access to information "not available to the public generally."[90] In both cases, regulations limiting reporters' access to prisoners were upheld. In *Houchins v. KQED*,[91] the Court held that the Constitution does not mandate a right of access to government information or sources of information and that there is no constitutional right of access to county jails.[92]

A series of cases that considered access to courtrooms followed the prison cases and reopened the possibility that the press might enjoy a constitutional right of access to government information. Beginning with *Richmond Newspapers v. Virginia*,[93] the Court recognized a right of media access to criminal trials.[94] However, that right was no greater than the right enjoyed by the public to attend criminal trials.[95] Additionally, *Richmond Newspapers* recognized the need for open trials as a means of assuring that the government is conducting fair trials.[96] Thus, closing trials not only implicates the right of a free press, but the right to a fair trial.

Two years later, *Globe Newspaper Co. v. Superior Court*[97] solidified the majority opinion that the First Amendment guar-

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[81] Hackworth, *supra* note 20, at 32.

[82] *See* Alter, *Did the Press Push Us into Somalia?*, NEWSWEEK, Dec. 21, 1992, at 33 (arguing that it was practical considerations, and not television coverage, that prompted the operation in Somalia).

[83] *See, e.g.*, Elliott, *The Making of a Fiasco*, NEWSWEEK, Oct. 18, 1993, at 34; Blumenthal, *Why Are We in Somalia?*, NEW YORKER, Oct. 25, 1993.

[84] *See, e.g.*, *Right of Access*, *supra* note 4, at 287; Comment, *Press Access to Military Operations: Grenada and the Need for a New Analytical Framework*, 135 U. PA. L. REV. 813 (1987) [hereinafter *Press Access*]; *Assault on Grenada*, *supra* note 27, at 483; *but see Press Restrictions*, *supra* note 4, at 675 (arguing that control of access in the Persian Gulf was not unconstitutional but that prepublication reviews were).

[85] 408 U.S. 665 (1972).

[86] *Id.* at 681.

[87] *Id.* at 700.

[88] 417 U.S. 817 (1974).

[89] 417 U.S. 843 (1974).

[90] *Pell*, 417 U.S. at 834.

[91] 438 U.S. 1 (1978).

[92] *Id.* at 15-16.

[93] 448 U.S. 555 (1980).

[94] *Id.* at 580.

[95] *Id.* at 572-73.

[96] *Id.* at 571-72.

[97] 457 U.S. 596 (1982).

anteed a right of access to criminal trials because criminal trials historically have been open to the public.[98] The Court has upheld the right of access of the press to criminal trials in subsequent cases.[99] Critics of military press relations cite this line of cases in arguing that a right of access to the battlefield exists.[100]

A three-part test to determine whether the media is entitled to access to a government activity can be inferred from *Globe Newspaper*. First, for a right of access to exist, the government activity historically must be open.[101] Second, press access must play a significant role in the function of the government activity.[102] Finally, press access can be limited despite meeting the first two prongs of the test if a compelling government interest exists to limit access and these limits are narrowly tailored to meet that compelling interest.[103]

While *Globe Newspaper* found that access to criminal trials met all those tests, the Supreme Court most likely would find that access to military operations does not. First, and most importantly, warfighting does not involve a historical pattern of openness. While reporters have at times enjoyed a great deal of freedom in covering warfare—such as during the Vietnam War—the military frequently has imposed strict limitations to press access to the battlefield when the need arose. Furthermore, the military historically has determined when there is a need to limit access and what means must be used. Past practices have included total denials of access, credentials for reporters, censorship and, most recently, pool reporting and security reviews. Furthermore, the power of military commanders to exclude members of the public when they believe the exclusion is necessary for mission efficiency has long been recognized—even in peacetime.[104]

Second, while some news coverage of warfare is necessary to make the public aware of a conflict, the media's role in warfare is not as significant as it is in the justice system. For instance, a lack of battlefield coverage does not implicate other constitutional protections, such as Due Process, as a lack of coverage of trials does. Arguably, some level of press access is necessary to keep the Nation informed. However, access to the battlefield would not be necessary to meet that need.

Finally, there is a compelling government interest in controlling access to military operations. The most important reasons to control media access are for operations security and to maintain the advantage of surprise. However, in making its case for press exclusion, the military also might point to logistical problems in dealing with numerous reporters or to possible negative effects on troop morale.

Prior Restraints

Several commentators have argued that the military's system of prepublication review of news stories violated the constitutional prohibition against the prior restraint of news.[105] However, the pool reporting system established for the Persian Gulf War did not violate the prior restraints doctrine.

The doctrine arose from the celebrated case of *Near v. Minnesota*.[106] In *Near*, the Supreme Court struck down a Minnesota statute that provided for the abatement, as a nuisance, of a "malicious, scandalous and defamatory newspaper, magazine or other periodical."[107] Under authority of that statute, officials had sought to shut down a newspaper known as *The Saturday Press*, an unquestionably reckless newspaper that attacked local politicians and "Jew gangsters."[108] However, the Court held:

> The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any less necessary the immunity of the press from previous restraint in dealing with official misconduct. . . . Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.[109]

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[98] *Id.* at 605.

[99] *See, e.g.*, Press Enterprise Co. v. Superior Court, 464 U.S. 501 (1984).

[100] *See Right of Access, supra* note 4, at 287; *Press Access, supra* note 84, at 813; *Assault on Grenada, supra* note 27, at 483; *but see contra*, Cassell, *supra* note 28, at 931.

[101] *Globe Newspaper*, 457 U.S. at 605.

[102] *Id.* at 606.

[103] *Id.* at 607.

[104] *See* Greer v. Spock, 424 U.S. 828 (1976).

[105] *See, e.g., Press Restrictions, supra* note 4, at 675. *But see contra, Right of Access, supra* note 4, at 287.

[106] 283 U.S. 697 (1931).

[107] *Id.* at 701-02.

[108] Fred W. Friendly, MINNESOTA RAG: THE DRAMATIC STORY OF THE LANDMARK SUPREME COURT CASE THAT GAVE NEW MEANING TO FREEDOM OF THE PRESS 45-49 (1981).

[109] *Near*, 283 U.S. at 720.

However, Chief Justice Hughes observed that the right to publish was not unlimited, stating, "No one would question but that a government might prevent . . . publication of sailing dates of transports or the number or location of troops."[110]

The Court further examined the doctrine of prior restraint in the "Pentagon Papers" case, *New York Times v. United States*.[111] The government had sought to enjoin publication of materials pertaining to United States involvement in the Vietnam War.[112] The Court reiterated its belief that the government "carries a heavy burden of showing justification for the imposition of such a restraint."[113]

However, the prepublication security reviews used during the Gulf War did not constitute prior restraints, because the military did not restrain the news organizations. Each of the news organizations *agreed* to the security reviews as a condition on participating in the pool system. Because the military may constitutionally control access to the battlefield, nothing prevents the military from requesting the news media to agree to a system of prepublication review as a condition on access to the front. If a news organization flouted the agreement and published without a security review, that would be in effect a breach of contract, and the military's recourse would be to deny future access. Thus, the military's control over the press comes not from prior restraint, as it did in *Near* and *New York Times v. United States*, but from subsequent action within its authority, which is allowed.

This security review arrangement is analogous to an agreement that a reporter occasionally will make under which he or she agrees that, in exchange for certain information or an interview with a source, the reporter will allow the source to read the story before it is published. Prior restraint is not implicated, because the reporter has agreed to the condition to get some information to which that reporter would not otherwise have access. If the reporter was to violate the source's trust—that is, "burn" the source—by violating the arrangement, that reporter could expect that future access to that source would be denied.

Even if the security reviews were held to constitute prior restraint, the prior restraint doctrine still provides an exception for publication of "national security" information that would cause "irreparable damage to our Nation or its people."[114] The Court likely would uphold a reasonable security review system, regardless of whether the news media had consented to the reviews, although the Court might skeptically view a system that unnecessarily delayed routine stories.

A Practical Approach to Media Relations

While current case law makes it apparent that media relations efforts during the Persian Gulf War passed constitutional muster, the *Globe Newspaper* factors still may be evolving. While the "compelling interest" prong of the test appears to be a permanent fixture in the law, the first two factors—the "historically open" and "significant role"—could change. Additionally, as Lieutenant Colonel Richard Machamer observed, "factors such as a higher number of casualties over a longer period of war can cause public confidence to decline, thereby resulting in demands for information from sources outside the military."[115] Assuming that the favorable coverage of Desert Storm was the result of the military's policies is dangerous.[116] Furthermore, continued strict press restrictions might result in Congress imposing rules less flexible than those of the Sidle Panel.

Because of these concerns, the military should not be inflexible regarding media access. Because the military's actions are likely to be upheld when a "compelling interest" in limiting access and information exists, the military generally should limit media access only when there is a compelling interest in so doing. This ordinarily would be limited to situations where operations security is at risk, although sometimes reasonable logistics considerations may come into play. Furthermore, the military arguably has a duty to protect members of the press operating within access rules.[117] Further, uncredentialed civilians roaming freely around the battlefield might create an operational problem; it may be difficult for field commanders to determine whether they are legitimate reporters. Absent these operational considerations, however, reporters ordinarily should be given reasonable access to the forward line of troops.

Some control over the media in a war zone is necessary. However, the military should be aware of the potential backlash that may result from a hard-line approach to media relations. When controls are necessary, they should cause as little intrusion into news gathering as possible. For instance, if mil-

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[110] *Id.* at 716.

[111] 403 U.S. 713 (1971) (per curiam).

[112] *Id.* at 714.

[113] *Id.*

[114] *Id.* at 730 (Stewart, J., concurring).

[115] Machamer, *supra* note 1, at 44.

[116] *Id.* at 46.

[117] *See, e.g.*, Wells-Petry, *Reporters as the Guardians of Freedom*, MIL. REV., Feb. 1993, at 26.

itary escorts are required, the escorts should allow reporters sufficient independence to gather information.[118] An escort need not shadow every reporter during one-on-one interviews. If security reviews of news stories are necessary, the process should run as quickly as possible—not cause delays as at times during the Gulf War.[119] The military should adhere as closely as possible to the principles identified by the Sidle Panel—that pool reporting last only as long as necessary; that reporters have access to all major units; that public affairs officers not interfere with reporting; and that security reviews not be required unless absolutely necessary.[120] If the military can create an atmosphere of fairness and efficiency in dealing with the media, then there may be a payoff when future warfighting does not go as well as Operation Desert Storm.[121]

Practice Pointers for Judge Advocates

Although from a constitutional standpoint judge advocates generally can advise commanders that the media has no right of access, practical considerations should caution restraint. Accordingly, in future conflicts, judge advocates will find the *Globe Newspaper* three-part test helpful in determining whether the media should be granted access to the military campaign. First, judge advocates should examine whether the type of warfighting to be engaged in would have included the media in the past. For example, clandestine operations or surprise invasions have not been subject to media scrutiny in the past. However, the aftermath of these actions would have. While members of the media can be barred from the initial invasion force, for instance, they should be informed as soon as practically possible. The general rule regarding the first prong of the *Globe* test can be summarized as follows: The military may impose reasonable limitations on press access to the battlefield when a legitimate need exists. Normally, such need should be limited to operational security.

Under the second prong of the *Globe* test, judge advocates may consider whether media coverage will play a significant role in the military operation. Because battlefield coverage does not implicate other constitutional protections, such as the Due Process aspect of trial coverage, that the media actually participate in the military operation is less imperative. However, because some level of media access is necessary to keep the public informed of its government's activities, judge advocates should counsel commanders to be reasonable in granting or denying access to military operations.

Under *Globe*, there must be a compelling governmental interest to limit access, and those limits must be narrowly tailored to meet the compelling interest. Although by their nature, military operations often will provide compelling reasons to limit press access, judge advocates should ensure that commanders are citing legitimate reasons for excluding the press—such as operations security or logistical concerns.

When media restrictions are necessary, judge advocates should examine whether the restrictions are appropriate to meet the military's need for control. The restrictions should not be more excessive than necessary. A total blackout, for example, rarely would be appropriate. Press pools and security reviews of media reports are reasonable measures to establish control and maintain security during military operations.

Finally, by adhering to the Sidle Panel's recommendations, the military should minimize its difficulties with the media. The Panel's recommendations are summarized as follows:

1. Plan media relations efforts concurrently with operational planning.

2. If pools are necessary, include the maximum number of reporters, and maintain pools for the minimum duration.

3. Generally, call for voluntary compliance of the media with press restrictions.

4. Plan for sufficient equipment and qualified personnel to meet media relations needs.

5. Make communications facilities available to the media as soon as practicable.

6. Make theatre transportation available to the media.

7. Promote media-military understanding through meetings and educational programs.[122]

Conclusion

Generally, the media is suspicious of the military, while the military mistrusts the media. The press normally perceives its role as producing as much relevant information about an event as possible. Conversely, the military has an intense security concern. As former Defense Secretary Cheney noted during the early hours of the ground war phase of the Persian Gulf War, "Even the most innocent-sounding information could be

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[118] *Id.* at 50-51.

[119] *Id.* at 52.

[120] *Id.* at 45.

[121] *Id.* at 54.

[122] Chairman of the Joint Chiefs of Staff Media-Military Relations Panel (Sidle Panel), Report 3 (1984).

used directly against the men and women whose lives are on the line carrying out these operations."[123]

The tension between the military and the media is not likely to disappear anytime soon. Institutional factors will persist. The military must recognize and understand the institutional factors that impose barriers on communications with the media. Judge advocates and public affairs officers should advise commanders that the reasons behind much of what frustrates them about the media is caused by factors that are not likely to change.

Many observers heralded the media relations policies in place during the Persian Gulf War. Those media relations efforts were constitutionally sound. However, in a costly fight of longer duration, the military could have had greater problems with the media. Somalia stands out as an example of what might happen to a sustained war effort if the media projects the mission in a negative light. When the United States entered Somalia, it had high hopes of stabilizing a volatile situation. However, less than a year later media reporting reflected widespread doubt over the venture.[124] Media reporting can have a major impact on United States war efforts. Commanders should be aware that the media will be a major part of future war efforts. Public support for a sustained military effort may be won or lost because of how the military manages to tell its story through the media. The military must allow the media to tell that story, good or bad. The military's treatment of the media can become part of the story, and unnecessary controls might make a bad situation appear worse—as though the military is trying to cover up negative aspects of a conflict. Thus, the military should take steps to mend the relationship between itself and the media to at least ensure that the treatment of the media will not be the cause of negative publicity of war efforts.

[123] Berke, *News From the Gulf Is Good and Cheney's Press Curbs Are Loosened*, N.Y. TIMES, Feb. 25, 1991, at A17.

[124] *See, e.g.*, *What Went Wrong in Somalia?*, U.S NEWS & WORLD REP., Oct. 18, 1993, at 33. Press pools and media escorts were not used during much of Operation Restore Hope. Machamer, *supra* note 1, at 52.

USALSA Report

United States Army Legal Services Agency

Litigation Division Notes

Representing the Army in Civilian Personnel Cases at the Administrative Level with a View Toward Court Litigation

Introduction

The number of employment discrimination claims that end up in federal court has increased significantly and steadily over the past three years.[1] Before these cases make it to federal court, they typically must first go through some level of administrative process. At a minimum, this means an investigative hearing by the Department of Defense Office of Complaint Investigations (DODOCI),[2] and often a hearing by an Equal Employment Opportunity Commission (EEOC) administrative judge.

At these two important hearings, the litigation begins and a major portion of the "administrative record" develops. While plaintiffs in federal court claiming employment discrimination are entitled to de novo review of their claims, the administrative record can be an invaluable tool for attorneys defending the Army in court. The administrative record can be used for both disposing of the case on motion[3] and successfully defending the case at a trial on the merits, if necessary. This only can happen if the administrative record reflects a thorough, aggressive defense by the labor counselor litigating the case at the administrative level.

[1] In 1992, the Army (usually the Secretary of the Army) was named as defendant in 106 new civilian personnel cases. In 1993 that number rose to 141. In 1994 the number of new civilian personnel cases was 222. In the first quarter of 1995, 58 new civilian personnel suits were filed, an annual average of 232.

[2] The DODOCI has replaced the United States Army Civilian Appellate Review Agency (USACARA) as the organization responsible for conducting initial investigations into civilian employee complaints of discrimination.

[3] FED. R. CIV. P. 12, 56. Historically, the Army has disposed of over 75% of the cases filed in federal court without the need for a trial because of an aggressive motions practice. Disposing of a case through a motion to dismiss (Federal Rule of Civil Procedure (Rule) 12) or for summary judgment (Rule 56) saves countless installation hours and dollars. For example, the various witnesses necessary for a trial that easily could last over a week are able to be at work instead of testifying.

This note will suggest some techniques and practices that labor counselors can use to establish an administrative record that will be useful in the event of court litigation. Although these suggestions are by no means exhaustive, they illustrate the following need: When litigating cases at the administrative level, labor counselors must do so as if *they* were preparing for federal court litigation. Treat the proceedings as a good trial defense counsel would in an Article 32 hearing: Be aggressive in fleshing out the facts. By taking this approach, you will identify strengths and weaknesses, thus encouraging an early resolution or, if trial is necessary, a successful result at trial.

Lock in Testimony Early

In most cases, the administrative investigation is the first opportunity to record witnesses' testimony (including the complainant's) under oath. This opportunity occurs when memories are fresh and witnesses are likely to be more candid because they have had less time to think about, and thus alter, what they will say and how they will phrase it. This presents a tremendous opportunity to "lock in" their testimony.

When questioning witnesses, concentrate on the prima facie case. Ask questions designed to expose a weakness in that case. For example, suppose your case is one where hostile environment sexual harassment is alleged and the complainant is testifying. One of the elements that the complainant must prove is that the harassment affected a term, condition, or privilege of employment.[4] Ask leading questions to pin the complainant down on exactly which term, condition, or privilege was affected and how. Your objective is to make the complainant admit facts that indicate that the working environment was not abusive, that the harassment was an isolated incident or minor in nature, or that it was not pervasive to the point of being intolerable. In asking these questions, remember that courts look at the totality of the circumstances in determining what is, or is not, harassment.[5] Ask questions designed to establish the following: a minimum (*i.e.*, frequency) of occurrences; a lack of severity; that no physical threats or humiliation occurred; that the conduct was merely an offensive utterance; and that the conduct did not interfere with the complainant's employment.

Once a labor counselor has a witness on record under oath, testifying to a certain set of facts, it is difficult for that same witness to later testify otherwise. If you are careful and approach these hearings well prepared, with a theory of the case based on the elements necessary to prove discrimination, and ask questions designed to establish that theory, you will have created an administrative record rich with material that the trial attorney can use to win the case in subsequent court litigation.

Discovery

An administrative record reflecting a well-defended case also makes discovery a more simple and accurate process. In the age of broad and affirmative discovery responsibilities enforced by Rule 37 sanctions,[6] identifying all relevant material and witnesses in the administrative record is critical. Because the Litigation Division and the United States Attorney's Office have no knowledge of the case before the complaint is filed and summons is served, the administrative record is critical in learning about the case and knowing how to respond to and propound discovery. Labor counselors must develop the record so that discovery materials are easily and quickly identifiable and so that witnesses can be located.

The labor counselor is in the best position to ascertain, obtain, and preserve all evidence in a case. He or she must enter all relevant documents into the record and properly identify witnesses. Documents should identify their author or custodian and be certified as accurate. Witnesses should be asked for full names, ranks/grades, position, social security numbers (SSN)[7] and home addresses. Because these cases often do not go to trial for years, during which time the labor counselor may change several times, the attorney representing the Army in litigation at the administrative level must preserve this information.

Labor counselors should read the current Federal Rules of Civil Procedure pertaining to discovery (Rules 26 to 37) with particular emphasis on Rule 26. Labor counselors must remember that local court rules may vary the time for compliance with discovery. For example, the United States District Court for the Eastern District of Virginia[8] has what is referred to as a "rocket docket." As the name implies, all cases move quickly in that jurisdiction. Providing discovery can become a problem when the administrative record is deficient or when potential witnesses cannot be accounted for. A labor counselor, familiar with the rules for discovery, will be able to ensure that the administrative record has the requisite information to comply with discovery requirements and requests once a lawsuit is filed.

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[4] The harassment must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.

[5] Harris v. Forklift Systems, 114 S. Ct. 367 (1993). In *Harris*, the Court stated that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." *Id.* at 371.

[6] Federal Rule of Civil Procedure 37 allows the court to award reasonable expenses, including attorney's fees, incurred in making or defending a motion to compel discovery.

[7] The SSN is the most useful device available for finding witnesses who have relocated. It is critical to accurately record the SSN.

[8] The Eastern District of Virginia is where the Pentagon is physically located. Therefore, many cases against the Secretary of the Army are filed there.

One area often overlooked in employment discrimination cases is that of character witnesses. In these cases, the plaintiff's veracity (and perhaps that of some of his or her corroborating witnesses) is often at issue. The labor counselor should identify and preserve the testimony of witnesses who will demonstrate the plaintiff (or others) as untruthful. The same holds true for the responding management official (RMO); if the labor counselor feels that he or she is being untruthful, investigate to determine if witnesses exist whose testimony would damage the RMO's credibility. Furthermore, try to find witnesses to counter those witnesses, if they exist.[9] If they do not testify at the administrative hearings, summaries of their testimony included later in the litigation report will help the trial attorney make important strategy decisions. If the complainant's character for truthfulness can be sufficiently undercut, the trial attorney will be left with a very valuable weapon for trial.

Audience

When participating in administrative hearings, labor counselors should remember the following: "Who may have to read this record?" Frequently, neither the assistant United States attorney nor the judge involved in the trial will have had any military experience, and, even those who have military experience, usually have had very little. In either case, the assistant United States attorney and judge typically are unfamiliar with military jargon and acronyms. When the labor counselor takes the time to define military terms, acronyms, and jargon during administrative hearings, no effort or time is lost doing so during trial.

Assume that everyone who eventually may read a record from a DODOCI investigation or EEOC hearing will know nothing about the military. With this in mind, elaborating on items like military command and control, or on the unique relationship between military commanders and the civilians who work for them, may be necessary. Have your witnesses briefly explain these matters and fully clarify any matter not explained on the record in the litigation report.[10]

Settlement

Equal Employment Opportunity complaints often are settled at the administrative level, which usually completely disposes of the case. Unfortunately, the complainant occasionally will later allege noncompliance with the terms of the settlement agreement. These settlement agreements are another area where the labor counselor can effectively represent the Army and preclude future litigation by actively and aggressively resolving all areas of potential confusion before any agreement is signed.

Do not be satisfied with the boilerplate settlement agreement left behind by a predecessor from another case. Be sure that every word included in the agreement says what you want it to say. Use precise language and accurate definitions of terms. Do not use jargon—legal or military. Fully explain issues such as attorneys fees, income tax on back pay, and continuation of medical benefits. Never commit the Army to doing something unless you are sure that the Army can do it legally. Include the language from 29 C.F.R. § 1614.504 concerning administrative remedies for alleged noncompliance. Have peers, supervisors, and those who will have to execute the terms of the settlement (*e.g.*, the Civilian Personnel Office, the Equal Employment Opportunity Office) review your drafts.

By paying close attention to these and other details, labor counselors can ensure a settlement that is secure and that can be enforced in court by the plain language of the document.

Support and Resources

For labor counselors to accomplish the important task of administrative litigation of employment discrimination complaints, they must have reinforcement and adequate support from their supervisors. Training is vital. If possible, incoming labor counselors should attend the Federal Labor Relations Course at The Judge Advocate General's School *before* moving into the job.

Overlap also is critical. Because these cases often take years to resolve, the continuity produced by just one month of overlap helps ensure that important facts and information are not lost. Support personnel remain vital. Every minute saved from time-consuming tasks (such as copying and organizing documents) is time available for legal research and case preparation.

Finally, a staff judge advocate who recognizes and emphasizes the importance of aggressive litigation at the administrative level in these cases sets the tone for success. This dynamic and increasing area of installation legal support can be every bit as challenging and rewarding as military justice practice.

Conclusion

Litigating civilian personnel suits is never easy and although many factors combine to produce this difficulty, labor counselors can avoid several of them. By aggressively representing the Army during administrative litigation with a view toward potential court litigation, labor counselors cannot only win more cases at the administrative level, but also ensure that the cases that inevitably end up in litigation have an administrative record that helps produce a victory in court. Captain Nance.

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[9] Remember that attorneys for the government (*i.e.*, labor counselors, litigation division attorneys, assistant United States attorneys) represent the Army and not any particular RMO. Nevertheless, inquiring into the credibility of the RMO will allow a labor counselor, early on, to accurately assess important strengths and weaknesses of the case and decide on appropriate strategy and disposition.

[10] *See* Major Herb Harry & Major Tom Ray, Note, *Litigation Reports: The Foundation of Civilian Personnel Litigation Case Preparation*, ARMY LAW., Jan. 1995, at 33.

Environmental Law Division Notes

Recent Environmental Law Developments

The Environmental Law Division (ELD), United States Army Legal Services Agency (USALSA), produces *The Environmental Law Division Bulletin* (*Bulletin*), designed to inform Army environmental law practitioners of current developments in the environmental law arena. The *Bulletin* appears on the Legal Automated Army-Wide System Bulletin Board Service, Environmental Law Conference, while hard copies will be distributed on a limited basis. The content of the latest issue (volume 2, number 6) is reproduced below:

Clean Air Act (CAA)

Medical Waste Incinerators

The Environmental Protection Agency (EPA) is proposing stringent new air emissions standards for new and existing medical waste incinerators under CAA §§ 111 and 129.[11] The regulation would affect and may preclude the use of the incinerators at Army hospitals and veterinary clinics that burn medical waste.

The regulation defines "medical waste" as any solid waste that is generated in the diagnosis, treatment, or immunization of human beings or animals, in research pertaining thereto, or in production or testing of biological materials. Medical waste encompasses a wide variety of materials, including waste chemicals/drugs that are not Resource Conservation Recovery Act (RCRA) hazardous waste and pathological waste. The definition does not include household waste, hazardous waste, or human and animal remains not generated as medical waste. For incinerators that burn only pathological waste, the regulation establishes recordkeeping and reporting requirements.

It may not be feasible for small incinerators, such as those typically found at Army hospitals and veterinary clinics, to meet the rule's stringent control and monitoring requirements. Army facilities would have to arrange for an alternate means of disposal, such as offsite disposal through commercial contractors or microwave or steam treatment. Environmental law specialists (ELSs) are encouraged to advise major command ELSs and the ELD of any potential mission and other consequences that would result from this rule. The ELD will assist in preparing Department of Defense (DOD) comments for submission to the EPA. The technical point of contact within the DOD on this rule is the Army's Center for Health Promotion and Preventative Medicine (CHPPM), Ms. Tobin, DSN 584-3500; (410) 671-3500, facsimile 3656.

Conformity Update

A federal district court recently held that CAA § 176(c) requires the EPA to promulgate conformity regulations for areas in attainment of National Ambient Air Quality Standards (NAAQS).[12] The court ordered the EPA to promulgate a regulation within 270 days. In November 1993, the EPA promulgated a regulation requiring conformity determinations for areas in nonattainment of the NAAQS.[13]

Title V "Major Source" Issue

The Deputy Under Secretary of Defense (Environmental Security) recently sent a letter requesting the EPA to issue formal guidance on the appropriate application of the "major source" definition to military installations under the Title V and New Source Review permit programs. Currently, the EPA and many states are treating entire installations as a single source, resulting in the aggregation of the many dissimilar sources of emissions on installations for permitting purposes. This results in the more stringent treatment of military installations than private industrial facilities. The DOD is urging the EPA to issue guidance that will allow installations and regulators the flexibility to appropriately divide installations into multiple sources based on industrial function and the separate control of tenant activities. With or without EPA guidance, installations should actively be working to seek agreement with state regulators on an appropriate "major source" determination.

CAA § 112(g) Preconstruction Permit Program

Under CAA § 112(g), on EPA approval of a state's Title V operating permit program, major sources of hazardous air pollutants (HAP) must obtain a permit prior to modification, construction, or reconstruction. Sources subject to CAA § 112(g) must meet maximum achievable control technology (MACT) requirements, determined for each source on a case-by-case basis. The problem has been that the EPA is now approving state Title V programs without having promulgated regulations implementing the § 112(g) permit program. The EPA anticipates promulgating a § 112(g) regulation in the summer of 1995. States and sources have strongly objected to implementing this complex program prior to promulgation of the § 112(g) regulation. As a result, in a major reversal of position, the EPA recently issued an Interpretive Notice providing that the § 112(g) program in states with approved Title V pro-

[11] 60 C.F.R. § 10654 (1995).

[12] Environmental Defense Fund v. EPA, C-92-1636 (N.D. Cal. Feb. 10, 1995).

[13] *See The EPA's New Conformity Rule*, ARMY LAW., Mar. 1994, at 37-38.

grams will not take effect until the EPA promulgates the § 112(g) regulation.[14] States, however, may enact programs similar to that required by § 112(g).

Accounting for Fugitives

In a recent settlement of *Clean Air Implementation Project v. EPA*,[15] the EPA has agreed to issue guidance on the treatment of fugitive emissions (emissions that cannot reasonably pass through a stack, vent, or equivalent opening) under the Title V operating permit program. The petitioners argued that the EPA does not have authority to regulate fugitive emissions under Title V without a formal rulemaking under CAA § 302(j) to determine that the benefits of such regulation would outweigh the costs. The EPA plans to initiate a § 302(j) rulemaking in the future, which will likely face strong opposition from private industry. In the interim, we expect that the EPA's impending guidance will allow state regulators the discretion to decide whether major sources must include certain collocated sources of fugitive emissions in the Title V permit. While considerable uncertainty over the meaning and scope of the settlement exists, it appears that the EPA's guidance will afford states and sources flexibility in the treatment of fugitive emissions under Title V that did not previously exist. Consequently, installations may be able to exclude particulate matter (PM_{10}) emissions from such sources as training ranges and prescribed burning from Title V permitting requirements. At this point, ELSs should alert installation technical personnel and contractors preparing Title V permit applications to this impending guidance. Major Teller.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

Challenges to CERCLA § 104 Cleanups

In an opinion dated 30 January 1995, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) denied an action by a citizen's group that challenged McClellen Air Force Base's § 104 CERCLA cleanup.[16] The Ninth Circuit held that CERCLA § 113(h) divests federal courts of jurisdiction over "any challenges" to a §104 cleanup, whether or not the challenge is brought under the auspices of the CERCLA. The Ninth Circuit also held that this jurisdictional limitation applies to all classes of plaintiffs, not solely to PRP plaintiffs, and therefore the citizen's group failed to meet jurisdictional requirements. The court found that a challenge under §113(h) exists where the relief sought would interfere with the CERCLA cleanup and specifically where a comprehensive interagency agreement exists. Therefore, the court declined to require McClellen to submit to the RCRA's individual reporting and permitting requirements. Moreover, where the source of the contamination is part of the cleanup, it is irrelevant that the source has leached or otherwise spread to a separate area if the remedy would interfere with the §104 cleanup. Ms. Fedel.

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[14] 60 Fed. Reg. 8333 (1995).

[15] No. 92-1303 (D.C. Cir. Feb 24, 1995).

[16] McClellen Ecological Seepage Situation v. Defense Dep't, 39 E.R.C. 2089 (9th Cir. 1995).

TJAGSA Practice Notes

Faculty, The Judge Advocate General's School

Contract Law Notes

Streamlining Government Acquisition (Or, "Why Can't the Government Figure Out How to Use Commercial Practices?")[1]

Introduction

We hear it time and time again. Make the government acquisition system simpler. Use commercial practices. Reduce the complexity of solicitations and contracts. Do away with government specifications and standards. Simplify, simplify, simplify!

Well, why not? Why do we not buy like commercial firms? Why must government contracts be filled with page after page of fine print? Why are there so many government inspectors? Why not use commercial specifications? Why does the government continue to do business with poor performers? Why do source selections take so long? *Why don't we wise up?* These are fair questions that deserve good answers.

Let us start by agreeing, first, that many things *do* need fixing. We *can* do better. We *can* be more like a commercial buyer. We *can* simplify. Many of the changes in the Federal Acquisition Streamlining Act of 1994[2] (Streamlining Act, or Act) will help. However, my purpose is to highlight some of the fundamental differences between commercial buyers and the government when the latter enters the marketplace as a buyer. Unless we understand those fundamental differences, it seems unlikely that we can fully appreciate why there are limits—very substantial limits—on how far the government may really go in adopting commercial practices in its efforts to simplify and streamline the acquisition process.

There are many—perhaps dozens of—reasons why the government is different from a commercial buyer. Although it might be interesting to try to list them all, I suggest that there are only a handful that are especially significant and have a dramatic impact on the way the government acquisition system works. These differences present, in my view, the biggest challenges to streamlining. To some extent, the differences are such that the government may never be able to completely adopt commercial practices. In other cases, the differences present obstacles that can be overcome, at least in part.

I have chosen to concentrate on four major differences. They are as follows:

- The differing responsibilities of government and commercial buyers, and the effect that those differences have on the way that the government chooses it contractors and administers its contracts;
- The impact of the government's funding rules;
- The effect of socioeconomic policies and programs; and
- The impact of a monopsony (*i.e.*, that some of the things that we buy are not sold in the commercial marketplace).

Finally, I would like to close on a positive note with a brief discussion of some of the opportunities that exist for improvement.

The Government's Responsibilities as a Buyer

Let us look first at the commercial side. A commercial buyer is responsible to its owners or shareholders and is influenced primarily by the desire to make a profit. Decisions as to sources for products and services may be arbitrary, if otherwise legal. Generally speaking, those decisions are not subject to challenge—in court or otherwise—by disappointed suppliers. Documentation to support contract award decisions need only be sufficient to satisfy internal management. Competition is optional. Loyalty to good suppliers is a major influencing factor, as is maintaining loyalty among those suppliers. Decisions regarding the selection of sources are highly subjective and judgmental; as a result, the leverage exerted over suppliers is great. Repeat: *The leverage over suppliers is great!*

Now consider the government as a buyer. The "shareholders" are the taxpayers. The use of public funds involves a public trust and a fiduciary responsibility. Generally speaking, competition is a must. Virtually all contract award decisions are subject to external review by third parties—the General Accounting Office (GAO), the General Services

[1] This note is a transcript of a presentation made by Brigadier General James C. Roan Jr. at the Contract Law Symposium held at The Judge Advocate General's School in January 1995. General Roan is the Staff Judge Advocate at Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio. The opinions expressed by General Roan are his own and do not necessarily represent Air Force policy.

[2] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

Board of Contract Appeals (if automated data processing equipment), and the courts. As a result, those decisions must be fully supported and documented, and must *not* be arbitrary.

Further, disappointed bidders are entitled, by law, to detailed debriefings explaining the rationale for award decisions. Those same bidders also are entitled to the equivalent of a temporary restraining order for the price of a postage stamp; that is, absent fairly extraordinary circumstances, the bidder may enjoin the award of contract performance by filing a protest. The bidder need not show, to secure a stay in performance, that it is likely to prevail on the merits, that it will be substantially harmed absent a temporary delay, or that the government will not be unduly harmed by a delay—all of which must ordinarily be shown to obtain a temporary restraining order in court when government contracts are not involved. Few, if any, sanctions exist for spurious protests.

Will the Streamlining Act change any of this? Yes--but it may only increase the likelihood of protests. The Act strengthens the concept of "bidders rights." Debriefings, including their timing and content, are now a matter of statutory right. As a result, the time for filing a protest may actually be lengthened in some circumstances, leading to more instances when award and performance are delayed—often at great cost to the taxpayer.

However, the most significant impact of all of this really does not have to do with documentation, delays, costs, or defending against protests; it has to do with *leverage*.

I mentioned earlier that commercial buyers have great leverage over their suppliers. That leverage exists because the commercial buyer is free to do business—or not do business—with particular suppliers as it, and it alone, considers what is best. The commercial buyer does not have to concern itself with protests, justification, documentation, or even a requirement to show fairness or compliance with the "rules." In short, commercial buyers have the freedom to do what "seems right," even though it may seem arbitrary to others. This freedom translates into the ability to select, and retain, suppliers of the buyer's choice. This latitude has a profound effect by requiring suppliers to:

> Deliver a quality product, on time at the agreed price;
>
> Provide what the customer wants, regardless of what the contract says, to ensure future business;
>
> Promise no more than they can deliver, if they expect to deal with that buyer again;
>
> Avoid "buy-ins" with the idea of making up losses through claims and demands for price increases tied to a strict and literal reading of the contract; and
>
> Expect to win only when the buyer—not a board or court—believes that the suppliers have submitted the best proposal.

In short, because the government does not have this kind of leverage over its suppliers, it has adopted many of the practices that distinguish it from the commercial world and which many contend should be "streamlined."

For example, government specifications and standards, and other "fine print," grow in an attempt to ensure that the government receives what it needs and bargained for. Suppliers who know that they are entitled to receive future business as long as they provide the bare minimum required by the contractor specification—regardless of whether the government is a "happy" customer or not—are not motivated to do more than the minimum. And the government is motivated to write the specifications as tight and all inclusive as possible. Legend has it that the government specification of angel food cake goes on for a dozen pages. Whether true or not, it is easy to see why this might be true. A commercial buyer simply will stop doing business with a supplier if the cake does not "taste good"—now that is leverage! The government, on the other hand, must continue to do business with the low bidder if the cake complies with the minimum requirements of the contract specification. And, because writing a specification in terms of "taste" is difficult, if not impossible, the government specifies *how the cake will be made* (*i.e.*, the recipe), with detailed instructions and minimum standards for each of the ingredients.

Additionally, government inspectors and auditors abound. As specifications become more complex, someone must make sure that the government receives what it bargained for—particularly when the seller is motivated to provide only the bare minimum.

Furthermore, source selections seem to go on forever. Award decisions must withstand challenges—even unsubstantiated and spurious ones—before impartial tribunals. Proposals must be evaluated in excruciating detail, because what offerors say they will do—rather than what they actually have done in the past—becomes the primary criterion for source selection. Although "past performance" can be—and often is—a factor in selecting the winning offeror, it becomes primarily a quantitative factor, rather than qualitative. That is, the question is whether the contractor met the *minimum* performance, schedule, and cost requirements of prior contracts. Those who have done so will receive passing marks, and are motivated to do no better the next time.

In short, the lack of the kind of leverage held by commercial buyers causes the government to write tighter and more detailed contract language, use more inspectors, and engage in lengthy and detailed source selections. Can these practices be streamlined? Perhaps, but probably only in the margins, unless Congress sees fit to grant the government the same discretion enjoyed by commercial buyers. The prospect of that happening is not particularly bright.

The Impact of Government Funding Rules

Anyone who has dealt with government acquisition, from either the industry or government side, will quickly under-

stand the problems in this area. Perhaps no other single factor distinguishes the government buyer from its commercial counterpart more than the way that the government goes about funding its acquisitions.

Commercial buyers are constrained by internal budgets, but, generally speaking, commercial funding issues seem to be limited to affordability and the cost of money or financing. However, the government buyer operates in a world of fiscal laws, policies, and procedures that probably are fully understood by only a handful of experts—and all of which are subject to change by the next statute of GAO decisions.

Commercial buyers tend to buy "big-ticket items" based on long-term contracts and economic order—quantities that take advantage of prices based on efficient schedules and production runs. The government generally does not—cannot—do this for its major systems acquisitions. Instead, major contracts usually are awarded (and priced) a year at a time. To make matters worse, funding amounts vary from year to year, with little regard for the most efficient funding profile over the entire program.

Why would any buyer, even the government, operate in this manner? The answer is simple: Congress requires annual budgets and appropriates funds a year at a time, with few exceptions. Consequently, individual programs are started, slowed down, stretched out, and otherwise changed each year as Congress directs. Additionally, various riders and restrictions often are placed on the expenditure of funds that further hamper, if not preclude, efficient contract performance—all at increased cost. My purpose is not to debate the merits—or folly—of congressional oversight of the acquisition process through its control of the purse strings. The process exists, in a major way, and the impact on the acquisition process is profound, vis-a-vis commercial practices.

Unfortunately, the problem is not limited to the annual appropriation process and the resulting slow downs, hurry ups, and inefficient work schedules and production runs. The fiscal rules also have a huge impact because of the limits placed on the type (or "color") of money that may be used (*e.g.*, operation and maintenance, research and development (R&D), production, construction), the "bona-fide needs rule" (the fiscal year money that may be used for a given requirement), the allocation and suballocation of funds down through the military departments, the "expiration" and "cancellation" of funds at varying times, the restrictions on reprogramming and transferring funds among and between accounts, approvals required from various management levels to spend funds in excess of specified amounts, and the list goes on!

Again, these difficult and always confusing rules make it virtually impossible for the government buyer to "follow commercial practices." Having adequate government funding is not enough. Opportunities to buy "smartly" are lost unless the right funds, in the right amount, from the right year in the right account, at the right subdivision, have been approved at the right management level.

Should the federal government follow commercial practices? Yes, but only if Congress is willing to give up some of its control and grant unprecedented discretion down to relatively low levels in the executive branch. So far, nothing indicates that this will happen.

The Effect of Socioeconomic Programs

Those familiar with federal procurement procedures quickly will appreciate the impact that socioeconomic programs have. Government acquisition programs are required, by law, to support numerous social programs and objectives, most of which do not apply in the commercial world. In 1972, the Commission on Government Procurement cataloged some thirty-eight different social and economic programs that are furthered through the procurement process. Little has changed since 1972.

For example, small business set-asides, by definition, limit competition, resulting in higher prices and reduced performance in some instances. Furthermore, the Service Contract Act[3] and the Davis-Bacon Act[4] add time to the acquisition cycle and tend to boost contract prices upward. The Buy American Act[5] limits competition, and excludes lower-cost foreign suppliers.

I could cite other examples. Of interest is the apparent lack of any meaningful data or studies identifying the cost of any of the socioeconomic programs. We simply do not know their impact (in terms of increased prices), the cost to administer the programs, delays, or decreased performance or quality. However, they do have a cost, and their existence poses a hurdle—if not a roadblock—in attempts to streamline the process by adopting commercial practices. Again, Congress undoubtedly will not see fit to modify these programs in the interest of efficiency.

The Impact of a Monopsony

Any discussion of adopting commercial practices in government acquisition must distinguish between the acquisition of commercial and military-peculiar items. Buying standard

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[3] 41 U.S.C. §§ 351-358.

[4] *Id.* §§ 276a-276a(7).

[5] *Id.* §§ 10a-10d.

"off-the-shelf" items that are widely available on the open market (such as the proverbial claw hammer or allen wrench) is quite different when the item being bought does not even exist and must be developed (such as the next-generation stealth fighter aircraft). Indeed, the military, to a considerable degree, uses commercial practices in the acquisition of commercial-type items. Recent changes in the Streamlining Act will make this more so, particularly for purchases under $100,000. The difficulty has to do with the big-ticket military items—tanks, aircraft, C4I spare hardware, missiles, and equipment that must be specially built to withstand combat conditions.

One cannot simply use "commercial practices" to procure the latter items, because there are no commercial practices available that one might copy. The government is the *only* buyer of these items; a "monopsony" market exists. That being the case, what opportunities exist to use "commercial specifications and standards?" *Are* there any such standards for military-unique items? In this regard, have we "streamlined" the process by now requiring *waivers* before government standards and specifications may be used when there is no commercial substitute? Have we "streamlined" the process by insisting on performance work statements in lieu of detailed specifications when the former provides no practical means of testing the product during development and manufacture? Have we "streamlined" the process by relying on commercial standards—when they do exist—if those standards permit multiple variations for items that must be fully interchangeable and supported in world-wide logistics systems? Or will these recent "streamlining" attempts serve only to slow down an already burdensome process?

In the commercial world, industry normally funds its own research and development, and companies develop products at their own expense with the idea that demand for the product will enable them to recoup their investment and, hopefully, make a profit. However, what company would be willing to do that if only one buyer—the government—would be interested in its product, and the development costs run into the billions? Northrop Corporation took that risk and funded the development of the F-20 Tigershark fighter in the late 1970s and early 1980s. They failed to sell a single aircraft, and wrote off more that a billion-dollar investment. It seems unlikely that any company will repeat that lesson. Is there a "commercial model" out there when large R&D programs are involved?

Where does that leave us? When streamlining is discussed, we need to dispel the notion that "one size fits all." We must distinguish between commercial and commercial-like items on one hand, and items that must be specially developed for the military on the other. Many opportunities for adopting commercial practices exist for the former. With regard to the latter, however, the challenges are greater.

Opportunities for Improvement

The easy way out would be to suggest that Congress simply remove the barriers discussed above: for example, give the government more discretion and leverage over its suppliers, limit protest relief, remove the funding restrictions, budget for the entire period of each acquisition (and stick to it), and ease the socioeconomic programs. However, the reality is that none of these things will happen.

Therefore, I propose the following courses of action, none of which would require changes in the law.

First, we can use award fees to a much greater extent (in fixed price supply contracts, for example). A powerful motivational tool, award fees place great discretion in the government's hands, enabling us to reward good performance and hit poor performers in the pocketbook—with a minimum of red tape, and without second-guessing by third parties. In short, award fees provide the government with additional leverage.

Second, greater use should be made of liquidated damages. Often used in the commercial sector, we generally have failed to take advantage of this tool except in construction contracts. Again, greater use would give us more leverage by providing a practical—and automatic—remedy for late deliveries and unsatisfactory performance.

Third, we must expand the concept of value-based acquisitions. Long used in major system acquisitions, we must buy more items based on best value, rather than low price. Suppliers who have a proven track record of high-quality items delivered on time and at a fair price must be given priority over marginal suppliers. It can be done, as shown by the success of various Air Force Materiel Command programs.

Fourth, we must insist on quality performance by promptly terminating, for default, those contractors who do not live up to their commitments.

Fifth, we must be more candid and open with our unsuccessful offerors by providing prompt and detailed debriefings. They are our business partners, not the "opposition." Our source selections are virtually always thorough, well done, and professional. Unfortunately, only those who are on the government team ever will know this unless we do a better job of communicating.

Sixth, we must weed out poor performers by being much more aggressive in the area of suspensions and debarments. The government's interests are not well served by continuing to do business with unsatisfactory suppliers because we are unwilling to invest the time and effort needed to process a suspension or debarment.

Seventh, we must learn to resolve problems by alternate disputes resolution techniques rather than formal litigation, whenever possible. Congress and the President have mandated it; we must make some cultural changes and learn to do it.

Finally, we all should understand that empowerment and delegating authority mean that individuals must be given the freedom to fail. Mistakes will be made, as they always have.

The solution, however, must not be—as usually has occurred in the past—to centralize authority and place it at higher levels (they will make mistakes as well, perhaps more, and they *definitely* will slow the process down). Instead, we must concentrate on *training*, and ensuring that we have the right people at the lowest levels with the authority to do the job.

Opportunities for improving the government acquisition process exist. It is not enough, or particularly helpful, however, to merely suggest that the government should simplify and "follow commercial practices." In most instances there are reasons why we do what we do. Those underlying reasons must be understood, and changed where possible, if we are to make fundamental improvements in the process. James C. Roan Jr., Brigadier General, USAF.

Fiscal Law Course

From 17 to 21 July 1995, The Air Force Judge Advocate General's School at Maxwell Air Force Base (AFB), Alabama, will broadcast a fiscal law course via the Satellite Education Network (SEN). Instructors from The Army Judge Advocate General's School (TJAGSA) will teach this course. Check with your local training officer to determine if your installation has the ability to receive the SEN broadcast. If you are interested in receiving this broadcast, have your local training officer contact the Center for Distance Education at the Air Force Institute of Technology, Wright-Patterson AFB. Specifically, contact Mr. Jeff Hurtt at (513) 255-7777, ext. 3158, or DSN 785-7777, ext. 3158. Your local training officer must reserve a suitably equipped room for the duration of the course. Each participating location will identify a point of contact for the course. This point of contact should contact Major Morris Davis at The Air Force Judge Advocate General's School, (334) 953-3436/DSN 493-3436, to coordinate course requirements (such as CLE credit, deskbooks, seminars). Each participating location must request one master copy of the deskbook from Major Davis for local reproduction. Seminar problems will be conducted at each receiving location. Once you have identified a seminar leader (ideally someone who attended a recent TJAGSA fiscal law course) have that person contact Major Davis to obtain the necessary seminar materials. The Army Training Requirements and Resources System (ATRRS) number for this course is 5F-F12a. Please ensure that all attendees are properly enrolled on the ATRRS.

The GAO Clearly Makes Time Violations Correctable

Recently, the GAO clarified whether an agency that erroneously obligated a prior year's appropriation could "correct" its error without violating the Antideficiency Act[6] (ADA, or Act). In *Farmers Home Administration (FmHA) Purchase of Office Chairs*,[7] the GAO held that if the agency had sufficient current year funds to cover the obligation, the agency could make the appropriate accounting adjustment without violating the Act. This note will explore the concept of "correctability" in the ADA context and explore the impact of *FmHA* on alleged ADA violations based on improper use of prior year funds.

The Concept of "Correctability."

The ADA states:

> An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation. . . .[8]

Taken literally, the statutory language suggests that any government employee who obligates or authorizes the government to pay an amount in excess of an available appropriation, even accidentally, is liable to face the potential consequences of violating the ADA.[9] For example, a contracting officer who awards a contract for an amount exceeding the amount of certified funds may violate the Act.[10]

Since 1897, the law has recognized that due to mistake, inexperience, or other reasons, government employees may make administrative errors that result in *technical* violations of the Act. In *Misapplication of Appropriations*,[11] the Comptroller of the Treasury held that:

> If the officer used money appropriated for a different purpose, credit should be withheld until money has been advanced to him under the proper appropriation, *except in cases where it is clearly shown which appropriation was actually and improperly used, and there are sufficient available funds under the proper appropriation so that a transfer to adjust appropriations can immedi-*

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[6] 31 U.S.C. § 1341(a) (1988 & Supp. V 1993). This statute prohibits agencies from making obligations in excess of available appropriations.

[7] B-251706, Aug. 17, 1994, 73 Comp. Gen. _____.

[8] 31 U.S.C. § 1341(a)(1)(A) (1988 & Supp. V 1993).

[9] Those consequences could be severe. The ADA requires agencies to take adverse personnel action against violators, which could include suspension without pay or removal. 31 U.S.C. § 1349(a) (1988). Additionally, persons who willfully violate the Act could face criminal penalties of up to two years imprisonment and a fine of up to $5000. 31 U.S.C. § 1350 (1988).

[10] The issue of whether the contracting officer has violated the Act will depend on whether additional funds are available to contract the deficit. If funds are not available, the contracting officer has violated the Act.

[11] 4 Comp. Dec. 314, 317 (1897).

ately be made. In such cases credit for the disbursements may be given under the proper appropriation, and at the same time and on the same papers a transfer will be called for to adjust appropriations. . . . This exceptional method of relief to disbursing officers is intended to apply to cases of unintentional misapplication of funds, arising, usually, from mistakes in the selection of appropriations and not to cases of willful disregard of the law as to their use. . . .[12]

Most cases addressing the issue of correctability involve alleged violations of the Purpose Statute.[13] A notable example is *To the Honorable Bill Alexander, U.S. House of Representatives*,[14] in which the GAO examined the propriety of Department of Defense's (DOD) use of Operation and Maintenance (O&M) funds to fund minor construction and humanitarian assistance performed as part of a joint training exercise in Honduras. In discussing the appropriate course of action that the DOD should take, the GAO stated:

> In the present case, it is our view that reimbursement should be made to the applicable O&M appropriation, where funds remain available, from the appropriations that we have identified to be the proper funding sources (*i.e.*, security assistance funds for training of Honduran forces, foreign aid funds for civic/humanitarian assistance activities, and, to the extent that O&M funds were not available under 10 U.S.C. § 2805(c), military construction funds for exercise-related construction).

Where adjustment of accounts is not possible (*i.e.*, because alternate funding sources are already obligated), expenditures improperly charged by DOD to O&M appropriations were made in violation of the Antideficiency Act, 31 U.S.C. § 1341(a). Not every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act. . . . *Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure.* Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already obligated), both 31 U.S.C. § 1301(a) and 31 U.S.C. § 1341(a) have been violated. *In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible. . . .*[15]

However, a few cases discuss correctability in situations involving use of the wrong year's funds. In *Matter of Substitute Grant Projects-South Carolina State College*,[16] the GAO advised the Department of Agriculture to adjust its fiscal year 1975 and 1976 appropriations to correct the improper use of 1975 funds on 1976 grants, and stated that only if sufficient unobligated 1976 funds were not available did a reportable ADA violation exist.[17] Similarly, in *Acumenics Research and Technology, Inc.—Contract Extension*,[18] the GAO recommended to the Department of Labor (DOL) that it adjust its appropriations when the DOL erroneously used fiscal year 1982 funds for funding service contract extensions for services in fiscal years 1983 to 1986. Again, the GAO indicated that an ADA violation would exist only if the DOL did not have sufficient unobligated funds of the proper year to make the adjustment.[19]

With this background, we now examine the *FmHA* case.

FmHA's *Facts*

In 1990, the Farmers Home Administration (FmHA) approved funding for moving and improving its Washington, D.C., headquarters. On September 11, 1990, as part of that project, FmHA issued two delivery orders for 225 ergonomic office chairs to a vendor selling office chairs under a General Services Administration (GSA) federal supply schedule (FSS) contract.[20] The delivery orders cited fiscal year 1990 funds and required the vendor to deliver the chairs by September 28, 1990.

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[12] *Id.* at 317 (emphasis added).

[13] 31 U.S.C. § 1301(a) (1988). This statute states: "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

[14] B-213137, 63 Comp. Gen. 422 (1984).

[15] *Id.* at 424 (emphasis added); *see also* the discussion in General Accounting Office, *Principles of Federal Appropriations Law*, Dec. 1992, vol. II, at 6-42 to 6-43.

[16] B-190847, 57 Comp. Gen. 439 (1978).

[17] *Id.* at 463-64.

[18] B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128.

[19] *Id.* at 14.

[20] Under the GSA's FSS program, agencies may place orders with designated firms that previously have contracted with the GSA on an indefinite-quantity, indefinite-delivery basis to provide designated items at designated prices. This allows agencies to procure common items without resorting to competitive acquisition. *See* GEN. SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REGULATION subpt. 8.4 (1 Apr. 1984).

However, because its new office space was not ready to occupy, FmHA directed the vendor to delay delivery. In October 1990, FmHA issued replacement orders to the vendor that amended the delivery date to April 30, 1991.

As a result of investigations by the United States Department of Agriculture (USDA) Inspector General and Office of General Counsel, FmHA cancelled the two earlier delivery orders in June 1991, and reissued a single delivery order for 440 chairs.[21] However, the new delivery order still cited the original 1990 funds and directed the contractor to deliver the chairs in November and December 1991 (*i.e.*, during fiscal year 1992).

On December 26, 1991, in an attempt to avoid an ADA violation, FmHA amended the new delivery order by changing the fund citation to cite fiscal year 1991 funds. The vendor, however, already had received two payments with fiscal year 1990 funds.

In early 1992, the USDA Inspector General requested the USDA Office of General Counsel to examine the situation concerning the new purchase order. The Office of General Counsel determined that FmHA once again exceeded the maximum order limitation allowed under the GSA schedule contract. Additionally, the Office of General Counsel found that the new order violated the ADA by (1) attempting to obligate expired 1990 funds for needs of fiscal year 1991,[22] and (2) attempting to obligate fiscal year 1991 funds (through the amended order) for a bona fide need of fiscal year 1992.[23] Dissatisfied with the findings of the Office of General Counsel, FmHA's Deputy Administrator requested the GAO to examine the issue.

The GAO's Rationale

In response, the GAO limited its discussion to whether FmHA had violated the ADA.[24] Specifically, the GAO placed the "bottom line up front" by stating in its first sentence: "We do not find a reportable violation of the Antideficiency Act."[25] The GAO then addressed both allegations of ADA violations.

Concerning the obligation of fiscal year 1990 funds in the amended fiscal year 1991 order, the GAO held that the initial obligation was improper. However, citing *To the Honorable Bill Alexander, U.S. House of Representatives, Matter of Substitute Grant Projects-South Carolina State College,* and *Acumenics Research and Technology, Inc.—Contract Extension,*[26] the GAO held that because FmHA had sufficient current funds at the time (fiscal year 1991) to correct the error and did so, FmHA did not commit a reportable ADA violation.

Unfortunately, the GAO's analysis of whether FmHA violated the "bona fide need" rule by using fiscal year 1991 funds to pay for supplies not delivered until 1992 is more obscure. Although the GAO held that no violation occurred, the analysis raised three possible rationales for its holding.[27] Because the GAO did not clearly indicate which rationale was the basis for the decision, the prudent attorney, absent additional GAO guidance, should proceed with caution in using this case to

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[21] The problems that the USDA investigations uncovered were that the original two delivery orders were designed to circumvent the maximum order limitation (MOL) under the contract and that the delivery order did not identify specific items to purchase. Under FSS contracts, agencies may place orders only up to the MOL stated in the schedule. As a result of these errors, the Department of Agriculture Office of General Counsel determined that the original orders were void ab initio. Farmers Home Administration (FmHA), B-251706, Aug. 17, 1994, 73 Comp. Gen. ___.

[22] The FmHA fiscal year 1990 appropriations could be used to pay for agency needs existing during fiscal year 1990. After the end of fiscal year 1990, the remaining unobligated appropriations go into "expired" status, which means that they can be used to adjust preexisting obligations (such as inscope contract changes), but *not* to fund new obligations. 31 U.S.C. § 1553(a) (Supp. V 1993). As a result, the Office of the General Counsel concluded that FmHA violated the Antideficiency Act by making an new obligation in excess of fiscal year 1990 funds available for obligation (which was zero).

[23] The problem arises from the Bona Fide Needs Statute, which requires agencies to used fixed appropriations (appropriations with a set period of availability) only for needs arising during that period of availability. *Id.* § 1502(a) (1988 & Supp. V 1993). For supply contracts, the general rule is that agencies must obligate funds of the year that the agency actually will use the supplies ordered. *See* Betty F. Leatherman, Dep't of Commerce, B-156161, 44 Comp. Gen. 695 (1965). In this case, the Office of General Counsel concluded that because FmHA did not take delivery of the chairs until fiscal year 1992, FmHA should have used fiscal year 1992 funds (rather than fiscal year 1991 funds) to purchase the chairs. As a result, according to the Office of General Counsel, because the fiscal year 1992 Appropriations Act had not been enacted by June 1991 (when the new delivery order was issued), FmHA violated the ADA by obligating funds prior to Congress enacting a proper appropriation. 31 U.S.C. § 1341(a)(1)(B) (1988 & Supp. V 1993).

[24] Interestingly, the GAO did not address the issue concerning whether the new delivery order was void ab initio because it exceeded the MOL of the GSA schedule contract. This writer must assume that because FmHA requested an opinion only on the alleged ADA violations, the GAO elected to address only the questions asked.

[25] *FmHA*, 73 Comp. Gen. at ___.

[26] *See supra* notes 14-18 and accompanying text.

[27] The GAO advanced three rationales. First, FmHA had a need for the chairs since 1990, which continued into 1991 and that, under the circumstances (delays beyond FmHA's control), FmHA obligating fiscal year 1991 funds for that need was not unreasonable. Secondly, the chairs were not purchased for a particular office, but to replenish and augment FmHA's inventory of chairs. As a result, the chair purchase fell within the so-called "stock level" exception to the general rule discussed above, which allows agencies to obligate funds of an earlier year to purchase replacement stock items, even though the replacement items will not be actually used until a succeeding fiscal year. *See* Betty F. Leatherman, Dep't. of Commerce, B-156161, 44 Comp. Gen. 695, 697 (1965) (defining "stock" as "readily available common-use standard items"). Finally, the GAO stated that because FmHA ordered the chairs from a GSA schedule contract, prior GAO decisional law required FmHA to obligate funds current at the time of the order. *See* Matter of GSA-Multiple Award Schedule Multi-year Contracting, B-199079, 63 Comp. Gen. 129 (1983).

support, for example, an expansion of the "stock level" exception.[28]

Conclusion

FmHA appears to clarify the issue of whether agencies may correct errors in use of funds other than errors based on accidental violations of the Purpose Statute. Under *FmHA*, agencies may clearly correct improper use of funds based on errors such as accidental use of expired funds, so long as unobligated proper funds exist to correct the error.

However, *FmHA* creates confusion over the exact scope of the "stock level" exception to the bona fide need rule as to supply contracts. As a result, for the reasons stated above, the prudent attorney would be wise to wait for additional guidance from the GAO to see if *FmHA* is the GAO's signal that the stock level exception is truly expanding or whether *FmHA* is an aberration limited to its specific facts. Major Hughes.

Administrative Law Notes

Employment Law Practice Notes

Equal Employment Opportunity Settlements

Both law and regulation encourage federal agencies to settle equal employment opportunity (EEO) complaints.[29] A settlement allows the agency wide discretion to tailor an appropriate remedy to fit the circumstances. However, this authority is not unlimited and must be exercised within the limits of law and regulations.

Before approving any term in a settlement agreement, the labor counselor must find specific authority to provide the relief or benefit contemplated. An award of money, for example, must be based on a specific waiver of sovereign immunity for payment of appropriated funds of the United States. There is no "catch-all" provision that allows for payment of damages not specifically authorized by law. Backpay awards to job applicants are limited to two years from the date of an EEO complaint.[30] These backpay awards must be calculated and paid under the restrictions of the Backpay Act.[31]

During settlements, labor counselors should remember that the agency's authority is limited by what a court of competent jurisdiction could award to a prevailing employee.[32] If the court could not provide the relief in litigation, neither can labor counselors in settlement. The Equal Employment Opportunity Commission (EEOC) has recognized these limitations in its administrative awards.

In examining the adequacy of an agency's offer of full relief,[33] the EEOC has analyzed the parameters of relief available under its administrative complaint process. It found that the relief available in the administrative process is identical to the relief available on a finding of discrimination on the merits by a court of competent jurisdiction.[34]

In fashioning an appropriate settlement in an EEO complaint, labor counselors and supervisors should be creative and imaginative. However, there are boundaries that they may not exceed. Labor counselors may not rely on the insistence of an EEOC administrative judge or the "advice" of an investigator. Those "authorities" are not responsible for certifying the legal sufficiency of the settlement; *you* are! Major Hernicz.

Interim Relief Revisited

More than five years have passed since the Whistleblower Protection Act (WPA) of 1989[35] became law; yet the Merit Systems Protection Board (MSPB) and the United States Court of Appeals for the Federal Circuit (CAFC) continue to

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[28] A reason to be concerned in regard to the stock level exception comes from the GAO's prior decision in *To the Secretary of Defense*, B-114578, 32 Comp. Gen. 436 (1953), which "created" the stock level exception. In that case, the GAO held orders relying on the stock level exception had to "comply with the general rule that the materials, supplies, or equipment ordered are intended to meet a *bona fide need of the fiscal year* in which the need arises or to replace stock *used in that fiscal year.*" *Id.* at 437 (emphasis added). Under the facts in this case, it appears questionable whether the chairs ordered in 1991 were to meet a need of *fiscal year 1991* (because the order directed the contractor not to deliver the chairs until fiscal year 1992) or were to replace stock (*i.e.*, chairs in this case) "used" (which from the language suggests no longer available in stock) in *fiscal year 1991*.

[29] 42 U.S.C. § 2000e-5(b) (1994); 29 C.F.R. § 1614.603 (1994) ("Each agency shall make reasonable efforts to voluntarily settle complaints of discrimination as early as possible in, and throughout, the administrative processing of complaints, including the pre-complaint counseling stage. Any settlement reached shall be in writing and signed by both parties and shall identify the allegations resolved.").

[30] 29 C.F.R. § 1614.501(b)(3) (1994).

[31] 5 U.S.C. § 5596 (1994); 5 C.F.R. pt. 550, subpt. H (1994); 29 C.F.R. § 1614.501(c)(1) (1994).

[32] An agency actually has much more flexibility in settlements than courts have in litigation. The agency can include in a settlement, for example, employee off-site training, new office space, reassignment, and other "benefits" that the court may not award. Although the agency can discipline coworkers or supervisors based on information obtained in the EEO complaint process, the issue of discipline is beyond the scope of an EEO complaint. The EEO process allows only for personal relief to a complainant, and discipline of another employee is not relief personal to the complainant. These requests fail to state a claim and should be rejected. *See* 29 C.F.R. §§ 1614.103, 1614.107 (1994).

[33] During the administrative processing of an EEO complaint, an agency may cancel a complainant if the complainant refuses to accept a valid offer of full relief. *Id.* § 1614.107(h).

[34] Ward D. Taylor v. John H. Dalton, Secretary, Dep't of Navy, EEOC No. 01940376 (July 22, 1994). This conclusion is based on the Supreme Court's "make whole" analysis in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

[35] Pub. L. No. 101-12, 103 Stat. 34 (codified in scattered sections of 5 U.S.C.).

issue new—and sometimes contradictory—interpretations. Labor counselors must carefully research the *most recent* case law in this area before deciding on a course of action.

One issue that should be well settled, but continues to cause problems, is interim relief. The WPA requires an MSPB administrative judge (AJ) to order interim relief whenever an appellant prevails in an initial decision and the agency petitions for review of that decision.[36] Failure to comply properly with an AJ's interim relief order will result in dismissal of the agency's petition for review (PFR).[37] The actual means of implementing an interim relief can, however, moot a petition for review if done incorrectly. The agency must restore the employee's pay and benefits, but it can avoid returning the appellant to the workplace if it finds the employee's presence would be "unduly disruptive to the work environment."[38]

To properly implement an AJ's interim relief order, *do not cancel the underlying personnel action!* The MSPB has held consistently that by cancelling the underlying personnel action, an agency causes the PFR to become moot.[39] An agency should reinstate an employee entitled to interim relief by a temporary appointment pending the PFR.[40] The purpose of interim relief is "not to make the appellant whole at the interim relief stage of the proceedings."[41] The employee must be restored to full pay status as of the day of the initial decision, but does not receive back pay or an expungement of records pending the agency's PFR.[42]

The CAFC recently has held that the MSPB may not scrutinize for bad faith an agency's finding that return of an employee to the workplace would be unduly disruptive. In *King v. Jerome*,[43] the Small Business Administration (SBA) reinstated the appellant in compliance with the AJ's interim relief order. It found, however, that the appellant's presence in its Dallas, Texas, office would be unduly disruptive to operations and morale and transferred him with full pay, benefits, and travel allowances to its Chicago office. The MSPB found that the SBA had not implemented the AJ's interim relief order because the transfer to Chicago was in "bad faith" and dismissed the PFR.[44] The Office of Personnel Management intervened on behalf of the SBA in the appeal to the CAFC, which found that the MSPB had no authority to review the agency's undue disruption determination.[45] The MSPB had argued that such a review was the most efficient and logical means of policing the agency's actions; a collateral administrative action would be wasteful. The CAFC was not convinced. The court found that although it might be a more efficient method of review, "Congress did not grant [the MSPB] the authority to review an agency's determination made under section 7701(b)(2), and it is not for the board to supplant the remedies Congress expressly provided or create new remedies which it believes Congress overlooked."[46] Under this holding, the MSPB may only review whether the agency actually made an undue disruption determination and whether the employee has received appropriate pay and benefits.[47] Major Hernicz.

Line of Duty—How Strong Is the Presumption of "In Line of Duty?"

The 19th Administrative Law for Military Installations (ALMI) Course was held at TJAGSA from 20 through 24 March 1995. Students for the ALMI Course come from all

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[36] 5 U.S.C. § 7701(b)(2)(A) (1994) ("If an employee or applicant or employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review . . ."); 5 C.F.R. § 1201.111(c) (1994).

[37] 5 C.F.R. § 1201.115(b)(4). Shaishaa v. Department of Army, 60 M.S.P.R. 359 (1994); White v. United States Postal Serv., 60 M.S.P.R. 314 (1994); Reid v. United States Postal Serv., 61 M.S.P.R. 84 (1994); Harrell v. Department of Army, 60 M.S.P.R. 164 (1993); Ralph v. Department of Treasury, 55 M.S.P.R. 566 (1992); Labatte v. Department of Air Force, 55 M.S.P.R. 37 (1992); Ginocchi v. Department of Treasury, 53 M.S.P.R. 62 (1992).

[38] 5 U.S.C. § 7701(b)(2)(A)(ii) (1994); 5 C.F.R.§ 1201.111(c) (1994). The agency still must provide the employee pay and benefits.

[39] *See, e.g.*, Basco v. Department of Army, 65 M.S.P.R. 496 (1994); Gevaert v. Department of Navy, 65 M.S.P.R. 65 (1994); Cain v. Defense Commissary Agency, 60 M.S.P.R. 629, 631 (1994) (by cancelling the underlying personnel action, the agency effectively removes the matter from controversy).

[40] *See, e.g.*, Avant v. Department of Navy, 60 M.S.P.R. 467 (1994).

[41] *Ginocchi*, 53 M.S.P.R. at 71 n.6.

[42] Kimm v. Department of Treasury, 64 M.S.P.R. 198 (1994).

[43] 42 F.3d 1371 (Fed. Cir. 1994).

[44] Jerome v. Small Business Admin., 56 M.S.P.R. 181 (1993). The MSPB's "bad faith" analysis stems from its decision in *Ginocchi*, 53 M.S.P.R. at 62, where it found that Congress had not provided for review of undue disruption determinations and that it, therefore, would review agency decisions to prevent details, assignments, or restrictions of duties made in bad faith. The Board's rationale was "[t]o guard against the possibility of an employee's having to suffer the assignment of inappropriate duties as the result of an agency's abuse of the authority to determine that the employee's 'return' would be unduly disruptive, but his 'presence' would not be." *King*, 42 F.3d at 1374 (quoting *Ginocchi*, 53 M.S.P.R. at 70). As authority for its review, the MSPB cited its general enforcement powers, 5 U.S.C. § 1204(a)(2) (1988 & Supp. V 1993) (authorizing the MSPB to "order any Federal agency or employee to comply with any order or decision issued by the board under [its adjudicatory authority] and enforce compliance with any such order").

[45] *King*, 42 F.3d at 1375.

[46] *Id.* at 1375-76 (citing United States v. Fausto, 484 U.S. 439 (1988); Carter v. Gibbs, 909 F.2d 1452 (Fed. Cir.1990)).

[47] *See also* DeLaughter v. United States Postal Serv., 3 F.3d 1522 (Fed. Cir. 1993).

uniformed services. The course included a seminar focused on addressing problems that students bring from the field, many of which are of general interest to all practitioners. This note addresses one of the problems discussed in the ALMI.

More than one student at the ALMI Course, and many practitioners in the field, wrestle with the strength of our regulatory presumption in favor of in line of duty (ILD) determinations.[48] One problem raised at the ALMI Course focused on a Reservist who presents an injury that he claims was sustained on a previous period of active duty. Without direct evidence from unit personnel to corroborate the claim, the question of whether the injury is incident to service becomes more difficult.

At least one legal review examining similar circumstances found that the military's burden of rebutting the ILD presumption could cause an investigation to expand into a Reservist's nonactive duty time to confirm that there was not an alternative explanation for the injury. Taken to its extreme, this position might result in the Army being responsible for any claimed injury of a drilling Reservist without any proof that the injury occurred while the soldier was in an authorized duty status. This rational has prompted other attorneys to conclude that the soldier has the burden to show that the injury occurred while in an authorized duty status.

Although superseded by the release of the new *Army Regulation (AR) 600-8-1*,[49] practitioners still need to refer to the previous version of *AR 600-8-1* because the new regulation does *not* address line of duty determinations.[50] Accordingly, the most current regulatory guidance applicable to line of duty investigations (LODI) remains chapters 37 to 41 of the previous version of *AR 600-8-1*. Unfortunately, this older version of *AR 600-8-1* does not address the issue directly; the question remains, has a link between service and injury been refuted by substantial evidence?

In the case of the Reservist who alleges an injury that occurred on a previous period of active duty, substantial evidence actually may be readily available. For example, the investigation initially may include only the soldier's allegation, however, within a reasonable period, the investigation also should include a medical exam. If the exam supports the soldier's allegation, unit members also should be available to corroborate: (1) the activity which allegedly caused the injury was performed, and (2) that the soldier reacted in some way consistent with being injured. Absence of either could constitute substantial evidence that refutes the link to active duty and the ILD presumption. Once the presumption is refuted, but not before, the burden is effectively transferred to the soldier.

Line of duty determinations can significantly affect the interests of the individual concerned. Due process rights provided to the individual by regulation must be afforded, and investigations should be complete. Attorneys familiar with the line of duty process know, however, that determinations also affect the government's interests. Presumptions in favor of ILD status may give some deference to the individual, but should not be used to unduly prejudice the agency. Practitioners experiencing significant issues of interest are encouraged to involve the proponent in their resolution.[51] Major Block.

International and Operational Law Notes

United States Ratifies 1980 United Nations Conventional Weapons Convention

On 24 March 1995, President Clinton signed and deposited with the depositary the United States instrument of ratification for the 1980 United Nations Conventional Weapons Convention (UNCCW) and two of its three protocols.[52] The focus of the treaty, which was an outgrowth of the 1974—1977 Diplomatic Conference on Humanitarian Law,[53] is to limit those weapons capable of causing unnecessary suffering to either combatants or noncombatants.[54] The treaty will enter into force for the United States on 24 September 1995. This note discusses the key provisions of the treaty.

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[48] *See* DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY AND MEMORIAL AFFAIRS AND LINE OF DUTY DETERMINATIONS, para. 39-5b (18 Sept. 1986) ("Unless refuted by substantial evidence contained in the investigation, an injury, disease, or death is presumed to be in LD.").

[49] DEPT OF ARMY, REG. 600-8-1, OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994).

[50] A new and separate regulation, *AR 600-8-4, Line of Duty Investigations*, should be released in the near future. While it does not expressly resolve the issue raised in this note, the subject has been brought to the proponent's attention. Many readers will be happy to know that the new regulation provides expansive guidance for the Reserve Components.

[51] The PERSCOM Line of Duty Branch Chief is Ms. Peggy McGee. Inquiries to the branch can be made by calling (703) 325-5302.

[52] Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 19 I.L.M. 1287 [hereinafter UNCCW]. The three protocols are: Protocol on Non-Detectable Fragments (Protocol I); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II); Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III).

[53] W. J. Fenrick, *New Developments in the Law Concerning the Use of Conventional Weapons in Armed Conflict*, 1981 CAN. Y.B. INT'L L. 229, 237-38 (1981).

[54] The UNCCW does not state that the weapons treated, or the uses of any of these weapons, violate the Hague IV Regulations, prohibiting weapons that are calculated to cause unnecessary suffering. Article 23(e), Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations, 18 Oct. 1907, 36 Stat. 2277, T.S. 539. Such a finding would have implied that nations previously had used illegal weapons or used legal weapons in an illegal manner. Fenrick, *supra* note 53, at 240; J. Ashley Roach, *Certain Conventional Weapons Convention: Arms Control or Humanitarian Law?*, 105 MIL. L. REV. 3, 17 (1984) (UNCCW did not codify what was customary law, instead the convention reflected "contractual undertakings adopted out of the common desire of the negotiators to control the conduct of future hostilities among those willing to accept them"). The bulk of the convention provides protections for noncombatants, only Protocol I provides express protections for combatants.

The treaty consists of eleven largely procedural articles. Of primary importance is the UNCCW's scope of application. The UNCCW applies to international armed conflicts as discussed in common article 2 of the Geneva Conventions, as well as to those conflicts described by the controversial article 1(4) of Additional Protocol I.[55] The United States filed a reservation to a subsequent article (Article 7) of the UNCCW which effectively avoids application of the convention to the latter conflicts, thus ensuring that the United States position remains consistent.[56]

Protocol I of the UNCCW consists of one article. It prohibits the use of any weapon whose primary effect is to injure a combatant by fragments which X-rays cannot detect.[57] These weapons have the potential to increase the needless suffering of combatants because physicians may not be able to quickly detect the fragments. The absence of these type of weapons in the United States arsenal, or in any nation's arsenal, renders this protocol of limited utility.[58]

Protocol II places prohibitions and restrictions on mines, booby traps, and other devices.[59] Article 3 contains general restrictions on these weapons including a prohibition on directing them against civilians (to include reprisals), and a prohibition on their indiscriminate use.[60] In planning the use of these weapons, military planners are required to take all feasible precautions to protect civilians from the effects. Article 3 defines feasible precautions as "those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations."

These general restrictions also apply to the Convention's treatment of the more specific means of employing these weapons. Furthermore, Protocol II also contains more detailed guidance for remotely delivered mines and nonremotely delivered weapons (whether they be mines, booby traps, or other devices) employed in populated areas outside the combat zone. Remotely delivered mines (*e.g.*, scatterable

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[55] Article 1(4) of Additional Protocol I states as follows:

> The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1(4), 16 I.L.M. 1391 (1977), *reprinted in* DEP'T OF ARMY, PAMPHLET NO. 27-1-1, PROTOCOLS TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1979). In 1987, President Reagan decided not to submit Protocol I to the Senate for its advice and consent largely because of this provision. He objected to what he termed the "politicization" of international humanitarian law by making wars of national liberation, previously considered internal conflicts, into international armed conflicts based on the "moral qualities" of the conflict, not objective reality. Message of the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims on Non-international Armed Conflicts, Concluded at Geneva on June 10, 1977, 100th Cong., 1st Sess. (1987).

[56] "Article 7(4)(b) of the Convention shall not apply with respect to the United States." 141 CONG. REC. S4568 (daily ed. Mar. 24, 1995). Article 7(4)(b) provides for application of the UNCCW between a national liberation movement and a state, in the case where the state is a high contracting party to the UNCCW, but is not a party to Additional Protocol I. The high contracting party (*e.g.*, the United States) if engaged in a conflict with a national liberation movement, would be bound to apply the UNCCW if the authority representing that national liberation movement agreed to accept and apply the obligations of the 1949 Geneva Convention and the UNCCW. While the means by which such a movement can manifest its agreement to be bound is beyond the scope of this note, the United States reservation ensures that the United States will not apply the UNCCW to such conflicts.

[57] This protocol was motivated by concerns over the use of United States cluster bomb units (CBUs), which contained plastic components. On closer examination, however, the convention negotiators realized that the vast majority of modern munitions contain fuzing mechanisms or lightweight plastic shell casings not designed as wounding agents. Memorandum from W. Hays Parks to The Judge Advocate General (23 Oct. 1980) (on file with the author). For this reason, Protocol I refers to weapons whose "primary effect" is to injure through the use of nondetectable fragments; consequently, the CBU and other modern fragmenting weapons are *not* prohibited by the Protocol. Roach, *supra* note 54, at 69-70.

[58] *See* Fenrick, *supra* note 53, at 242; Roach, *supra* note 54, at 69.

[59] Article 2 defines these terms as follows:

> 1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.
>
> 2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
>
> 3. "Other devices" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

UNCCW, *supra* note 52, art. 2 Protocol II. Note that Article 1 also expressly excludes naval mines from the coverage of Protocol II. *Id.* art. 1, Protocol II.

[60] Article 3 defines indiscriminate use as any placement of these weapons that is not directed at a military objective. It also defines as indiscriminate that use which violates the rule of proportionality: use "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated." *Id.* art, 3, Protocol II. It should be noted that a military objective can include an area of land. Burris M. Carnahan, *The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons*, 105 MIL. L. REV. 73, 79 (1984).

mines) are prohibited unless they are used in areas that are military objectives. Even then, the mines also must be either capable of having their location accurately recorded or contain a self-actuating or remotely-controlled device that renders the weapon harmless when it no longer serves a military purpose.[61] Nonremotely delivered weapons being used in a populated area outside combat zones (where combat is not taking place or is not imminent) also are prohibited unless employing forces either place the weapons near a military objective or take protective measures for the benefit of nearby civilians (*e.g.*, provide them with a warning).[62]

Article 6 contains prohibitions on various types of booby traps. As a general rule, the treaty bans those booby traps designed in the form of apparently harmless objects and those that are designed to cause superfluous injury and unnecessary suffering.[63] Specifically prohibited are booby traps attached to or associated with a list of ten items.[64]

The remaining three articles of Protocol II, and its technical annex, deal with precautionary requirements to mitigate the effects of these weapons. Article 7 states recordation requirements governing minefields, as well as mines and booby traps, and, following the cessation of hostilities, disclosure requirements involving these records. The technical annex to the UNCCW provides broad guidance regarding the content of these records. United Nations forces and fact-finding missions also are to be protected from mines and booby traps in accordance with Article 8.[65] Finally, Article 9 encourages parties to a conflict, following the cessation of hostilities, to cooperate in removing or rendering ineffective minefields, mines, and booby traps placed during a conflict. Ratification of the UNCCW will not impact United States land mine operations as current United States regulations comply with the UNCCW guidelines.[66]

The United States declined to consent to be bound to Protocol III of the UNCCW because of military and humanitarian concerns.[67] Protocol III restricts "pure" incendiary weapons, that is, those weapons whose primary effect is to set fire to objects or to cause burn injury to humans.[68] The United States concerns about Protocol III center on Article 2(2), which bans the use of air-delivered incendiary weapons against military objectives located within a concentration of civilians.[69] This prohibition goes beyond customary Law of War requirements by negating the commander's ability to perform the normal proportionality analysis in this particular scenario.[70] The United States position is that air-delivered incendiaries may be the "weapon of choice" against certain targets (*e.g.* chemical munitions plants) and that their use may result in fewer civilian casualties than would the use of conventional munitions.[71]

In ratifying the UNCCW, the United States joins more than forty other nations as a party.[72] While ratification of the UNCCW has no immediate impact on United States military operations, it clarifies the law of war regarding an area previously not expressly addressed by international convention.[73] Perhaps even more importantly, becoming a party to the UNCCW permits the United States to become a voting partici-

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[61] UNCCW, *supra* note 52, art 5, Protocol II. The United States military employs scatterable mines, which are remotely deployed by the hundreds from launchers on trucks or aircraft, and also from artillery shells. United States scatterable landmines self destruct. BUREAU OF POLITICAL-MILITARY AFFAIRS, U.S. DEP'T OF STATE, HIDDEN KILLERS: THE GLOBAL LANDMINE CRISIS 53-54 (1994) [hereinafter HIDDEN KILLERS].

[62] UNCCW, *supra* note 52, art. 4, Protocol II.

[63] *Id.* art. 6(1)(a), (2). The latter prohibition would prohibit the use of hidden pits containing pungi sticks, poisoned with excrement. Carnahan, *supra* note 60, at 90.

[64] Examples of such items include the following: internationally recognized protective symbols; the sick, wounded or dead; medical facilities; children's toys; religious objects, and animals.

[65] United Nations forces increasingly find themselves deployed to heavily mined areas (*e.g.*, Liberia, Mozambique, Angola, Rwanda). Consequently, if the scope of Protocol II is extended to internal conflicts, as discussed *infra* note 75, this provision will become relevant. HIDDEN KILLERS, *supra* note 61, at 12.

[66] *Id.* at 53.

[67] 141 CONG. REC. S4568 (daily ed. Mar. 24, 1995).

[68] Article 1 clearly includes weapons such as napalm and flamethrowers within its coverage, but also expressly excludes weapons that have an incidental incendiary effect (*e.g.*, tracer rounds and white phosphorous) as well as munitions with a combined effect (*e.g.*, armor-piercing shells, which combine penetration with an incendiary effect).

[69] This term is broadly defined as "any concentration of civilian, be it permanent or temporary, such as in inhabited parts of cities, or inhabited towns or villages, or as in camps or columns of refugees or evacuees, or groups of nomads." UNCCW, *supra* note 52, art. 1, Protocol III.

[70] W. Hays Parks, *The Protocol on Incendiary Weapons*, 279 INT'L REV. RED CROSS 535, 548 (1990).

[71] *Id.*

[72] 141 CONG. REC. S4568 (daily ed. Mar. 24, 1995). Other major nations that have ratified the UNCCW include Australia, China, France, Germany, India, Japan, Netherlands, Norway, Russia, Spain, Ukraine, and the United Kingdom. Hans-Peter Gasser, *Universal Acceptance of International Humanitarian Law*, 302 INT'L REV. RED CROSS 458-63 (1994).

[73] HIDDEN KILLERS, *supra* note 61, at 57; Carnahan, *supra* note 60, at 73-74; Fenrick, *supra* note 53, at 243.

pant in the Fall 1995 UNCCW Review Conference and to continue to play the leadership role it exercised in its four preparatory sessions.[74] That conference will be primarily concerned with amending Protocol II so that it may be effective to combat the world-wide proliferation of antipersonnel land mines.[75] Lieutenant Commander Winthrop.

Legal Assistance Items

The following notes advise legal assistance attorneys of current developments in the law and in legal assistance program policies. You may adapt them for use as locally published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; send submissions to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

Family Law Agreements—Exploring Their Limits

Attorneys generally are sensitive to the legitimate reasons of avoiding litigation in family law cases. In addition to generating significant expense, litigation may cause heightened emotional trauma for adults and children, and produce unpredictable or undesired results. Agreements, on the other hand, usually save money and give the parties some control over their own destiny. Assuming a reasonable agreement can be reached, expectations regarding compliance are likely enhanced.

Despite their general appeal, several recent cases emphasize that agreements can be subject to significant limitations. For example, in *Blum v. Ader (Blum)*, a New Jersey Superior Court defeated a separation agreement's election in favor of Delaware law and ordered payment of college expenses.[76] While Delaware law does not require payment of these expenses, if the parents have the ability to pay and the child is eligible for college, New Jersey law does. Finding that the child involved was a New Jersey resident, the court recognized a right to college support that could not be bargained away.[77]

A recent California case, *Shasta County ex rel. Caruthers v. Caruthers*, focused on parental authority to bargain away continuing support obligations.[78] In *Shasta*, a mother agreed to dismiss her paternity suit with prejudice in exchange for a $15,000 settlement. Finding that this agreement ignored legitimate interests of the child which were unrepresented, the court determined that the child retained the right to attempt to establish paternity and obtain support. The court specifically found that neither dismissal with prejudice of the mother's action, nor the mother's agreement, could foreclose this fundamental right.[79]

McAlpine v. McAlpine, a Louisiana case, presents another example of ineffective waiver.[80] In *McAlpine*, the parties executed an antenuptial agreement which waived claims to permanent alimony in the event of divorce. In exchange, the husband agreed to pay a lump sum settlement that varied in size dependent on the length of the marriage.[81]

While acknowledging a trend to allow waiver in postmarriage separation agreements, the court found a premarriage waiver violative of public policy. Specifically, the court determined that waiver of alimony at this early stage would fail to insulate the public from the potential need for public assistance of a spouse without a right to alimony.[82]

Family law agreements, and particularly separation agreements, will continue to be of major interest to Army Legal Assistance Program clients. Legal Assistance Attorneys (LAAs) should be sensitive to the possibility that the ability of the parties to agree may not be the only limit on the terms of an agreement. As the above cases demonstrate, the impact of childrens' rights and public policy concerns can be a factor.

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[74] HIDDEN KILLERS, *supra* note 61, at 27.

[75] The State Department estimates that there are 80 to 110 million antipersonnel land mines indiscriminately strewn across 64 countries. The greatest concentrations occur in the civil war torn nations of Afghanistan, Angola, and Cambodia. One of the principal United States initiatives for the review conference is to extend the protections of the UNCCW to internal conflicts where most of these mines are currently employed. *Id.* at v., 1, and 27. The United States has signalled its intention to seek broader application of the UNCCW by making a declaration in its ratification of the treaty, stating that the United States will apply the UNCCW to all armed conflicts referred to in common articles 2 and 3 (applying to internal conflicts) of the Geneva Conventions of 1949. 141 CONG. REC. S4568 (daily ed. Mar. 24, 1995).

[76] 21 Fam. L. Rep. 1226 (BNA) (N.J. Sup. Ct. 1995).

[77] *Id.*

[78] 21 Fam. L. Rep. 1185 (BNA) (Cal. Ct. App. 1995).

[79] *Id.* at 1186.

[80] 21 Fam. L. Rep. 1195 (BNA) (La. Sup. Ct. 1995).

[81] *Id.*

[82] *Id.* at 1196. A dissenting opinion would have required evaluation of spousal need at the time of divorce on a case-by-case basis. If the public was adequately protected, waiver could be enforced.

Because the significance of this impact is largely dependent on state law, LAAs must have access to state law resources, or be prepared to seek assistance from, or referral to, someone who does. Major Block.

Involuntary Allotment Defenses

Several months ago this section presented a discussion of the two statutory defenses to the Involuntary Allotment.[83] This note discusses the other defenses included in Department of Defense (DOD) Directive 1344.9 (Directive) and DOD Instruction 1344.12 (Instruction). These defenses include both a number of enumerated defenses as well as some that the Directive and Instruction implicitly raise.

The enumerated defenses include the following: information in the application is false or erroneous; the judgment has been modified or set aside; legal impediments exist to processing the allotment; or other "appropriate reasons."[84] The Directive specifically notes that legal impediments include either pending or completed bankruptcy proceedings.[85] Furthermore, the Directive places the burden of proof for all of these defenses on the soldier seeking to avoid the involuntary allotment.[86] Perhaps the best assistance an LAA can give may be to assist soldiers in gathering the necessary documentation to support their defense.

The implied defenses arise in two categories. The first category relates to the creditor's application. If the creditor files a false application, the soldier may be able to delay or defeat the allotment. The directive specifically notes that the Defense Finance and Accounting Service (DFAS) may deny applications by creditors that abuse the processing privilege.[87] Therefore, the LAA should carefully review the application package to ensure that the creditor has complied with the Directive.

The Directive requires that the creditor complete a number of certifications. One of the key certifications is that the pay of a similarly situated civilian could be garnished.[88] Thus, if the judgment is from a state that does not allow garnishment, the DFAS should deny the application. The DFAS will screen all applications to ensure that they meet this criteria. However, the LAA should double check this and the other certifications for full compliance.

This requirement to comply with state law also affects the amount of pay subject to involuntary allotment. The Directive states that the maximum that the DFAS will withhold is the lesser of twenty-five percent of a soldier's pay subject to involuntary allotment or a lower amount required by state law.[89] Some states have lower limits. However, *all* states are subject to the federal Consumer Credit Protection Act (CCPA). The act includes a lower limit that may apply to some junior enlisted personnel.

The CCPA includes two limits on garnishment. The first is virtually identical to the twenty-five percent limit found in the Directive.[90] The second limit is that the amount withheld for garnishment may not exceed "the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206(a)(1) of Title 29. . . ." Implementing guidance on this provision of the CCPA is found in the Code of Federal Regulations (CFR).[91]

The CFR contains numerous examples showing how to compute the garnishment limits. It also contains a chart showing the minimum pay that a garnishee must be left with to comply with the CCPA. The following example, however, displays how this alternate limit may benefit a junior enlisted soldier.

If an individual's disposable income is less than thirty times the federal minimum hourly wage, the pay is not subject to garnishment *at all*. The CFR contains tables showing weekly, biweekly, semimonthly, and monthly pay amounts corresponding to thirty times the federal minimum hourly wage. For a monthly employee, this amount is currently $552.50.[92]

If an individual's disposable income is between thirty and forty times the federal minimum hourly wage, *only* the amount above thirty times the minimum wage is subject to garnishment. The CFR includes a second table showing the weekly, biweekly, semimonthly, and monthly rate corresponding to forty times the federal minimum hourly wage. For a monthly employee, this amount is currently $736.67.[93]

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[83] *Defenses to Involuntary Allotments for Creditor Judgments—Implementing the Hatch Act Reform Amendments*, ARMY LAW., Jan. 1995, at 68.

[84] Indebtedness of Military Personnel, 32 C.F.R. § 113.6(b)(2)(iii)(D)(3)-(7) (1995).

[85] *Id.* § 113.6(b)(2)(iii)(D)(6).

[86] *Id.* § 113.6(b)(2)(iii)(E).

[87] *Id.* § 113.6(b)(2)(v)(C)(7).

[88] *Id.* § 113.6(b)(1)(F).

[89] *Id.* § 113.4(b).

[90] 15 U.S.C. § 1673(a) (1994).

[91] 29 C.F.R. § 870.10 (1994).

[92] *Id.* § 870.10(c)(3).

[93] *Id.* § 870.10(c)(4).

Assume a service member in basic entry training—an E-1 with less than four months service. A quick check of the pay chart reveals that the service member makes $790.20 in basic pay. Assume that the service member has no other pay subject to involuntary allotment. You would deduct the normal federal tax withholding from pay subject to involuntary allotment to compute pay available for involuntary allotment. For a single (unmarried) service member with no other dependents, claiming no exemptions, the proper withholding is $85.00 per month.[94] This leaves the service member with $705.20. This amount is greater than $552.50, but less than $736.67. Under this example, the maximum deductible (were this a true garnishment) would be $705.20 minus $552.50, or $152.70. Note that twenty-five percent of $705.20 is $176.30. The difference between the two figures, $23.60, may not seem like much, but it is (arguably) the service member's right to exempt this pay from creditors.

Note that as soldiers advance in rank (and pay), or if they have more deductions (and hence less withholding), they lose this protection. If the disposable income exceeds the figure of $736.67, then the amount of garnishment may be the full twenty-five percent.

Assume a service member—E-1 over four months—whose base pay is $854.40, single, with zero exemptions. Federal tax withholding is $97.00, which leaves $757.40. This is greater than the $736.67 on the table. Therefore, twenty-five percent of $757.40, or $189.35, is available for creditor judgments.

However, if the minimum wage increases, but service pay does not, more service members could be under the protective limit. If the minimum wage goes to $5.00 per hour, the forty times threshold should go up to $866.67.

The other state statute-related defenses include provisions in some states to limit garnishment on the "head of a household." Two states presently limit these garnishments. In Nebraska, only fifteen percent of the disposable income of an individual who is the head of a household is subject to garnishment.[95] In Florida, wages above $500 per week are exempt from garnishment *unless* the head of household consents in writing to the garnishment.[96] In both cases, however, the service member will have to prove to the DFAS the existence of the state provision and the facts that support the service member claiming the exemption.[97]

The second broad category of defenses is the "other appropriate defenses" aspect of the Directive. One potential defense that may work is a challenge to the underlying judgment. Assuming the judgment complies with the Soldiers' and Sailors' Civil Relief Act,[98] it may nevertheless be invalid due to a failure to obtain personal jurisdiction over the soldier. Additionally, the soldier should consider raising other defenses to the underlying judgment. For example, if the judgment creditor is a debt collector within the meaning of the Fair Debt Collection Practices Act (Act), there are only two fora available for suit on the debt. According to the Act, the collector may only sue in the same judicial district as the debtor resides, or in the district in which the contract was signed.[99] If the action was filed in the wrong venue, the service member should argue that it is an invalid judgment.

The "other appropriate defenses" category is a wide-open category. Legal assistance attorneys should diligently research available defenses and raise them on behalf of their clients. Service members are required to respond to their immediate commander within fifteen days of notification of the involuntary allotment application.[100] However, the commander may grant an extension (normally not exceeding thirty days) for good cause.[101] Legal assistance attorneys should draft letters for the service member's immediate commander requesting this extension if additional time is required to respond properly on behalf of the client. For example, the LAA may need documents from a state court in a distant location. It is reasonable to conclude that commanders should grant a request for extension to gather the requisite evidence under those circumstances.

Legal assistance attorneys must remember, however, that a successful defense to the involuntary allotment does nothing to affect the underlying judgment. Complete, competent advice to clients must include a discussion of this reality as well as exploration of methods to attack, reduce, or otherwise settle the underlying dispute. Major McGillin.

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[94] INTERNAL REVENUE SERVICE, CIRCULAR E, 46 (1994).

[95] NEB. REV. STAT. § 2-1558(1)(c) (1993). The statute defines head of household as including anyone who actually supports and maintains one or more individuals closely related by a blood relationship. *Id.* § 2-1558(3)(d).

[96] FLA. STAT. ANN. 222.11(2)(b) (1994). A head of household is any natural person providing more than half the support for a child or other dependent. *Id.* § 222.11(1)(c).

[97] *See* Message, Commander PERSCOM, TAPC-PDO-IP, subject: Army Implementation of Involuntary Allotments Procedures to Satisfy Judgement Indebtedness, para. 8G (171300Z Feb 1995).

[98] 50 U.S.C.A. §§ 500-593 (1994).

[99] Fair Debt Collection Practices Act, 15 U.S.C. § 1692i (1988).

[100] 32 C.F.R. § 113.6(b)(2)(iii)(B) (1995).

[101] *Id.*

Claims Report

United States Army Claims Service

Personnel Claims Note

The Estimate of Repair: What Should It Provide?

This claims policy note clarifies guidance found in *Department of Army Pamphlet (DA Pam) 27-162*,[1] paragraph 2-41a(5). In accordance with *Army Regulation 27-20*,[2] paragraph 1-9f, this guidance is binding on all Army claims personnel.

Department of the Army Pamphlet 27-162 provides that "[c]laims personnel should know which repair firms can be relied on to provide estimates only for new damages and which firms will provide estimates that include PED."[3] This language suggests that field claims offices recommend the use of these firms wherever possible. But do field claims offices regularly receive estimates of repair with sufficient data to determine new damage from old?

An acceptable estimate of repairs should meet the following criteria:

1. It should be legible.

2. It should be from a company that is willing to stand behind its estimate and complete repairs indicated to the customer's satisfaction.

3. It should identify shipment damage and distinguish its location on the item damaged from normal wear and tear or preexisting damage.

It also should describe the repairs to be made, and if an item is not repairable, state why it is not repairable (*e.g.*, it costs more to repair the item than it is worth, the item cannot be repaired because damage is too severe and it can never be used for its intended purpose). An estimate of repair that merely shows that an item is damaged and needs to be repaired or refinished, but offers nothing more, is of little use to a claims examiner.

A special category of repairs is upholstered furniture. An estimate of repair should break down the cost between labor and material, indicate the yards of material to be used and its cost per yard, and state that the material selected is equivalent to the material damaged.

The above criteria is especially important when a field claims office decides to take a deduction on an item for preexisting damage or recommend an unearned freight charge deduction.

4. It should include the date that the estimate was made, identify by inventory number the items evaluated, and fully identify the individual and firm preparing the estimate of repair. A claimant should show a copy of the inventory to the repair person so he or she can consider the carrier's description of preexisting damage when preparing the estimate.

5. It should state whether the cost of the estimate will be deducted from the work to be performed or is a separate fee.

6. It should be prepared by a firm that has expertise in repairing the items damaged. For example, a furniture repair person should not be giving estimates on repairing a damaged stereo unless the person has expertise in that area.

7. It should include drayage fees when appropriate.

Field claims offices will add the above criteria to the written instructions given to a claimant and verbally explain to the claimant what is required in an estimate of repair. The claimant should be further instructed that if the repair firm refuses to provide this information, then the claimant should look for another repair firm. Repair firms charge a fee for estimating, and that fee is reimbursable to the claimant or applied to the repair costs. Therefore, field claims offices should expect the most useful information possible. Field claims offices have the discretion to accept a particular estimate of repair that does not meet the above criteria to ensure that a claimant does not suffer an undue hardship in filing a claim. Exercise discretion in exceptional cases where the availability of repair firms which agree to meet the above criteria is limited. Annotate the chronology sheet to reflect this exercise of discretion.

Field claims offices should contact the local repair firms that provide the most estimates of repair for claimants and inform them of the need for this information. This information should result in the amicable resolution of many more

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[1] DEP'T OF ARMY, PAMPHLET 27-162, LEGAL SERVICES: CLAIMS (15 Dec. 1989) [hereinafter DA PAM. 27-162].

[2] DEP'T OF ARMY, REG. 27-20, LEGAL SERVICES : CLAIMS (28 Feb. 1990).

[3] DA PAM. 27-162, *supra* note 1, para. 2-41a(5).

carrier disputes on recovery demands. Lieutenant Colonel Kennerly.

Tort Claims Note

Federal Tort Claims Act Claims Arising from Shoplifting

Claims by persons suspected of shoplifting usually arise from their detention by employees of the Army and Air Force Exchange Service (AAFES)—mainly by store detectives. These claims must be abjudicated under the law of the state in which the claim arises.[4] The United States is considered the same as a private person for this purpose. Most states have enacted statutes authorizing merchants, or their employees, to detain or arrest suspects. These statutes were enacted as the common-law authority of citizen's arrest proved inadequate to protect merchants from claims.[5] These statutes protect a merchant only where probable cause for the detention exists.[6] These statutes also grant the authoriWty to conduct a reasonable search.

Under the Federal Tort Claims Act (FTCA), a claim arising from false arrest is excluded from consideration except when the arrest is by a federal law enforcement officer. Army and Air Force Exchange Service personnel have been held not to be federal law enforcement officers despite their denomination as store detectives.[7] Military Police (MP) have been held to be federal law enforcement officers.[8] Thereby, the involvement of an MP in a shoplifting detention or arrest removes the claim from the FTCA exclusion discussed above.

Army and Air Force Exchange Service operating procedures provide that store personnel do not have the authority to arrest, but merely to detain shoplifting suspects.[9] This is a distinction without a difference, as any restraint of motion with a view to the administration of justice constitutes an arrest. Army and Air Force Exchange Service rules also prohibit the search of a suspect.[10] Store personnel must immediately notify the MPs to come to the scene, take charge of the case, and conduct any search of suspects. Store personnel need not call the MPs when it becomes evident that the suspected shoplifter does not have the merchandise.[11]

Claims judge advocates or attorneys must become familiar with their state shoplifting laws and must properly train local AAFES personnel. If possible, develop local procedures within the guidelines of the *AAFES Security Manual* to avoid using MPs while, nevertheless, complying with the *AAFES Security Manual* edict not to search a suspect. Suspects should always be given the opportunity to voluntarily demonstrate the absence of stolen merchandise. Claims have been received in which the merchandise was relatively inexpensive and the claimant never was afforded an opportunity to voluntarily demonstrate that he or she did not possess the merchandise. The goal of a cooperative effort between the AAFES and claims personnel would be to avoid such occurrences. Mr. Rouse.

Claims Note

June Claims Video Teleconference

The next Claims Video Teleconference (VTC) will be held on 27 June 1995 between 1230 and 1430 Eastern time. This VTC will focus on personnel claims analysis. The target audience will be personnel claims adjudicators, claims judge advocates, and claims attorneys. Claims offices whose personnel will not be able to attend a live claims VTC broadcast may join in through audio hookup, or may request a videotape of the broadcast by sending a standard 120-minute VHS videotape to the USARCS Administrative Officer. Lieutenant Colonel Millard.

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[4] 28 U.S.C. § 2674 (1988).

[5] M.C. BASSIOUNI & CHARLES THOMAS, CITIZEN'S ARREST (1977)

[6] *Probable Cause for Detention* 47 A.L.R. 3d. 998 (1973).

[7] Solomon v. United States, 559 F.2d 309 (5th Cir. 1977); Busdecker v. United States, Civ. 84-99-OOL (M.D. Ga. 1984); Chamblin v. United States, Civ. M-76-544 (D. Md. 1977); Sanders v. Nunley, 634 F. Supp. 474 (M.D. Ga. 1985).

[8] Daniels v. United States, 470 F. Supp. 1119 (D.N.C. 1979). Despite the lack of reported cases, the Department of Justice's policy is to treat MPs as federal law enforcement officers since 28 U.S.C. § 2680(h) was amended by Public Law 93.253, *see* Pub. L. 93.253, 88 Stat. 50 (1975). This amendment states that acts of federal law enforcement officers are not excluded from consideration under the Federal Tort Claims Act.

[9] AAFES PUB., EXCHANGE OPERATIONS PROCEDURE 16-1: SECURITY, para. 9-10 (July 1992).

[10] *Id.* para. 9-34b.

[11] *Id.* para. 9-37.

All Enlisted

Regimental News from the Desk of the Sergeant Major

Sergeant Major Jeffrey A. Todd

Introduction

It has been seven months since I arrived at the Pentagon and assumed the duties of the Sergeant Major of the Judge Advocate General's Corps. I have spent most of that time trying to assess the state of the Enlisted Corps. As any experienced noncommissioned officer (NCO) might do on reassignment, I have tried to determine the lay of the land and to keep my finger on the pulse of my new environment. With that introduction, this note will not focus on specific issues. This being the first of a series of future pieces, I prefer to make only general observations and comments. I will address some specific issues, but not in depth; I will save detailed notes for the future.

Generally, the enlisted side of the Corps is in fine condition. Given the recent severe personnel losses we have experienced, we have fared well. The reasons we have weathered the storm are twofold, neither being more important than the other. First, despite the drawdown, our military occupational specialty (MOS) has been managed well in recent years. Although still in a state of flux, we have taken, and will continue to take, positive steps. We have a new standards of grade (SG); we are automating our Corps; we have greatly increased communication within the Corps (thanks to the Legal Automated Army-Wide System (LAAWS) Bulletin Board Service (BBS)); our assignment managers work tirelessly to ensure that we maintain a balanced Corps. The second reason behind our success is the hundreds of dedicated legal specialists and NCOs within our Corps. We have been asked to do more with less. We have done so because our soldiers have the talent, dedication, and the keen sense of duty required to accomplish any mission given them. With the proper mentoring from our senior NCOs, our junior soldiers will be capable of exceeding any standards that we might set—and this brings us to our first issue.

Rotation

We must cross train and rotate our soldiers. As in any profession, we have specialty areas. Military justice has long been the "Hollywood" portion of our mission, and although still important, it now shares its importance with other disciplines. Because of our focus on low intensity conflicts (LIC), international and operational law has become increasingly important. Additionally, our increased involvement in humanitarian missions requires claims expertise as well as knowledge of international law. Administrative discharges remain a viable tool for commanders and legal assistance remains an essential part of our mission. Our legal soldiers must be given the opportunity to cross train in as many of these areas as possible. Rotation is the responsibility of our senior NCOs; they must ensure that our soldiers are well rounded and not pigeon holed into one area.

Management by Walking Around (MWA) (Or, "Get Out from Behind That Desk!")

Although the concept of MWA may seem a curious, even humorous title for a management tool, it is an effective technique and is easy to get started. The first step is to get out from behind your desk. Visit your soldiers; talk with them. Stay in touch with the mood of each section or division. Drop in on other staff section NCOICs—Personnel and Administrative Center, Force Modernization, First Sergeant, Motor Pool, G3. Establish working relationships with these soldiers. Eventually, you will have to deal with all of these key personnel; but do not wait until then. Essentially, MWA is another form of "networking." However, networking may be done telephonically. Management by walking around calls for you to "put a face" with your telephone voice. It requires that you exhibit a genuine concern for your soldiers. It shows others in your command that you are interested in what they do, and that you are there to help the command accomplish it's mission. Yes, you have to "make" the time for it; but any time invested in MWA is usually time well spent.

Noncommissioned Officer Evaluation Reports (NCOERs)

In a later issue, I will discuss NCOERs in detail. But for now, let me share a few brief thoughts. In January of this year, the first Council of Command Sergeants Major met in Washington, D.C. Among the results of their meeting was the following statement: "Job performance should be the most important factor in an NCO's evaluation and promotion consideration." I agree with the Council, but would take it one step further—the NCOER, as a whole, is the single most important document that the promotion boards review. Forms 2-1 and 2A provide vital information, but the NCOER gives us a more complete and accurate picture of the soldier and answers some important questions: "What exactly does the soldier do?" "How well does the soldier do it?" And perhaps most important of all, "What kind of potential does the soldier show for greater responsibility—that is, promotion?" Everyone involved in the evaluation (*i.e.*, the rated soldier, rater, senior rater, and reviewer) should approach the process as if the soldier's career depends on it; in most cases, it does.

I look forward to sharing more thoughts with you in later issues of *The Army Lawyer*. If you have suggestions about future topics, forward them to me, preferably via the LAAWS BBS.

Notes from the Field

Tracking Criminals on the Information Highway: DIBRS Makes It Closer Than You Think

The Department of Defense (DOD) is currently designing the Defense Incident-Based Reporting System (DIBRS) to meet criminal justice-related reporting requirements mandated by the Uniform Federal Crime Reporting Act,[1] the Victim's Rights and Restitution Act of 1990,[2] and the Brady Handgun Violence Prevention Act (Brady Act).[3] The DIBRS will permit the DOD to forward offense and arrest information required by the National Incident-Based Reporting System (NIBRS) to the Federal Bureau of Investigation (FBI). The DIBRS also will build on the NIBRS by reporting information concerning the disposition of offenses required by the Brady Act and victim/witness notifications required by congressional mandates.[4] This note briefly discusses the background and uses of the NIBRS, as well as the proposed implementation and uses of the DIBRS.

Background

Since the inception of the Uniform Crime Reporting (UCR) program in 1930, the FBI has been collecting crime data dealing with offenses and arrests from approximately 16,000 county, state, and federal law enforcement agencies.[5] The FBI uses the data collected to publish "Crime in the United States," a statistical report for general public use, and to develop a reliable set of criminal statistics for law enforcement agencies throughout the country to use in their administration, operation, and management.[6] Over time, the information collected proved useful not only to law enforcement personnel, but also to the judiciary, academic community, legislators, government administrators, and other people interested in social indicators and criminal statistics. The methods for collecting this information also improved greatly.

How the NIBRS Is Used

During the late 1970s, the law enforcement community called for the expanded use of the UCR program and developed new guidelines for reporting crime statistics.[7] These guidelines formed the basis of the NIBRS under the Uniform Federal Crime Reporting Act.[8] The NIBRS requires law enforcement agencies, including those in the DOD, to collect and report data on two categories of offenses—Group A and Group B offenses.[9] For Group A offenses, reporting agencies must make Incident Reports for twenty-two offense categories, which are made up of forty-six specific crimes, including homicide, drug, theft, fraud, and sex offenses.[10] The Group A Incident Report contains, *inter alia*, administrative, offense, property, victim, and offender information.[11] For Group B offenses, reporting agencies must file Arrest Reports for eleven enumerated offenses, including bad checks, driving under the influence of alcohol, disorderly conduct, and other offenses not specifically designated as Group A offenses. This Arrest Report contains only information about the arrestee and the circumstances of the arrest.[12] Reporting agencies do not submit case disposition or conviction information for either category of offenses under the NIBRS.

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[1] 28 U.S.C. § 534 (1988).

[2] Pub. L. No. 101-647, 104 Stat. 4820 (1990).

[3] Pub. L. No. 103-159, 107 Stat. 1536 (1993).

[4] National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, §§ 533-534, 108 Stat. 2663, 2760-2763 (1994); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 552, 107 Stat. 1547, 1663 (1993).

[5] FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTING HANDBOOK, i, 1 (NIBRS ed. 1992) [hereinafter NIBRS EDITION]. Requested crime date is submitted either through a state UCR program or directly to the national UCR program administered by the FBI. *Id.* at 1.

[6] *Id.* at 1.

[7] *Id.*

[8] *Id.* Congress passed the Uniform Crime Reporting Act in conjunction with the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

[9] The NIBRS uses standard definitions for both categories of offenses to ensure the maintenance and utilization of uniform and consistent data. Because of the importance placed on the NIBRS data by its users, reporting agencies must report the required information as accurately, thoroughly, and timely as possible.

[10] NIBRS EDITION, *supra* note 5, at 5-6. The NIBRS defines an incident as "one or more offenses committed by the same offender, or group of offenders acting in concert, at the same time and place." *Id.* at 25. Group A offenses generally are more serious than Group B offenses. However, neither category of offenses can be clearly identified as either felonies or misdemeanors. A complete list of the Group A offenses for which *extensive* crime data must be reported and the Group B offenses for which *only* arrest data must be reported is located at Appendix A of this note.

[11] *Id.* at 25. Specifically, the Group A Incident Report asks 53 questions about the offense, including where the crime occurred; what, if any, weapons were used; what, if any, drugs were involved; and what was the relationship of the victim to the offender for crimes against persons and the offense of robbery. This and all other information required to be reported under the NIBRS will be reported under the DIBRS.

[12] *Id.*

State and federal agencies participating in the NIBRS use automated systems to report information on Group A and Group B offenses to the FBI on a monthly basis.[13] The FBI assembles, publishes, and distributes the data to contributing agencies, state UCR programs, government bodies, and others interested in the Nation's crime problem.[14] Law enforcement agencies consider the NIBRS data to be an indispensable tool in the war against crime because it provides them with detailed, accurate, and meaningful data about when and where crime takes place, what form it takes, and the characteristics of its victims and perpetrators.[15] Armed with this information, law enforcement personnel and government agencies affected by crime can use the information to acquire and efficiently allocate the resources needed to combat crime.

Implementation of the DIBRS

In October 1994, the Under Secretary of Defense for Personnel and Readiness circulated the Strategic Plan for the DIBRS to each of the military services.[16] The DOD received service comments in January 1995 that it will incorporate into an amended Strategic Plan and return to the services for final concurrence. The amended Strategic Plan will describe what the DOD must do to comply with the various statutory reporting requirements and will reserve the specific administration to the services. The plan envisions the DIBRS to be implemented in phases. The first phase, "NIBRS (Plus)," is targeted for January 1, 1996, and requires the services to use existing computer hardware and software to comply with the reporting requirements under the NIBRS "plus" those required under the Brady Act and victim/witness assistance legislation. The next phase, "DIBRS (Complete)," envisions that existing service computer systems will converge on more efficient and effective automated systems. The DIBRS (Complete) phase has a target implementation of 1997-1998.

To implement the DIBRS, the DOD will revise DOD Instruction 7730.47, Statistical Report of Criminal Activity and Disciplinary Infractions, which currently requires generic military justice reporting.[17] To facilitate compliance and ensure uniform reporting consistent with the new statutes, the Defense Manpower Data Center (DMDC) in Monterey, California, is developing an interface capable of receiving the specific information that the military services will report. Within each service, law enforcement, investigation, prosecution, and corrections personnel all will play a significant part in the DIBRS and all are involved in developing the final product.

How the DIBRS Will Operate

Initially, the DOD plans to collect and report all federally mandated requirements noted above during the NIBRS (Plus) phase. To accomplish this, the DOD must fully participate in the NIBRS. Automation is critical for reporting information through the NIBRS and for accessing compiled information. To date, the DOD has not had an integrated mechanism capable of participating in the NIBRS or complying with mandatory reporting requirements. Each military service has its own regulations, forms, and methods of collecting criminal information. The services use approximately twenty-three different automated computer reporting systems and databases to collect information, none of which are capable of transferring data to the other systems across functional lines without extraordinary means.[18] Therefore, the first step in developing a system that all of the service systems can use is a standard "dictionary" of terms called "data elements." The DOD is currently developing this dictionary.[19]

By January 1996, the NIBRS (Plus) will enable the military services to use their current computer reporting systems to provide monthly justice-related information to the DMDC for further dissemination to the FBI.[20] The services will provide, on request, data elements regarding administrative, nonjudicial punishment, court-martial punishment, and civilian court results on nonspecific military and civilian subjects.[21] They also will provide cumulative data pertaining to the victim/witness notification requirements and the Brady Act.[22]

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[13] As of February 22, 1995, only nine agencies at the state level were reporting data to the NIBRS. No federal agencies were reporting such data. The FBI is currently testing Federal Incident-Based Reporting System data (which is the federal version of NIBRS data) within the Bureau. If the DOD implements the first phase of the NIBRS as scheduled in January 1996, it will be one of the first federal agencies complying with the DIBRS's mandatory reporting requirements. Telephone Interview with Mr. Ashton Flemmings, Training Offices, Federal Bureau of Investigation (Feb. 22, 1995).

[14] NIBRS EDITION, *supra* note 5, at 2.

[15] *Id.* at 3.

[16] DIBRS WORKING GROUP, DEFENSE INCIDENT-BASED REPORTING SYSTEM STRATEGIC PLAN (1994) [hereinafter DIBRS STRATEGIC PLAN].

[17] DEP'T OF DEFENSE, INSTRUCTION 7730.47, STATISTICAL REPORT OF CRIMINAL ACTIVITY AND DISCIPLINARY INFRACTIONS (16 May 1973). The scheduled completion date for the revised Instruction is June 30, 1995.

[18] Army and Air Force law enforcement and Navy corrections personnel have developed systems that are beginning to reach across functional and service lines. However, the mechanisms will require funding for further development.

[19] The Information Resource Management Directorate of the Under Secretary of Defense, Personnel & Readiness, forwarded a 500-page volume of data elements to the services for comment. SRA CORP., PROPOSAL PACKAGE 24—DEVELOPMENTAL FOR INCORPORATION INTO THE DOD DATA MODEL (1994). The services returned their comments in early March and the appropriate revisions are being made. The final product will permit automated reports using a standardized data layout.

[20] The DIBRS (Complete) envisions an interface between systems of reporting for all affected DOD agencies at a later date.

[21] DIBRS STRATEGIC PLAN, *supra* note 16, at E-2.

[22] *Id.*

During the DIBRS (Complete) phase, the DOD envisions an interface with related reporting programs in the fields of equal opportunity, family advocacy, and drug/alcohol abuse. This will be accomplished using the same data dictionary and DMDC procedures now being developed for the NIBRS (Plus) phase.

Judge Advocate Involvement in the DIBRS

Judge advocate assistance will be critical to the success of the NIBRS (Plus) because judge advocates will provide the court-martial disposition information required by the program. Judge advocates will report this information through the Department of Defense Form (DD Form) 1569 series that will be included in DOD Instruction 7730.47. The current draft of DOD Instruction 7730.47 envisions that law enforcement personnel will collect basic information about a reported crime on an Incident Report (DD Form 1569).[23] They will then use a Cover Sheet (DD Form 1569-1) to forward the Incident Report to the appropriate Commander and staff agencies.[24] After taking action, up to and including referral to court-martial, the Commander will complete a Commander's Report on Action Taken (DD Form 1569-2).[25]

For incidents resulting in a court-martial, trial counsel will complete a Results of Trial form (DD Form 1569-3).[26] Use of this form will meet the notification requirements of Rule for Courts-Martial 1101.[27] The DD Form 1569-3 also will document the required victim/witness rights notifications and serve as a reporting vehicle for case dispositions in compliance with the Brady Act.[28] Corrections officials will use the case dispositions on the DD Form 1569-3 as intake information to determine issues such as minimum release and parole eligibility dates. Specific reporting requirements may change as the DOD continues to develop the NIBRS (Plus). However, JAG personnel should be prepared to provide required information and assistance beginning on or about January 1, 1996.

Conclusion

The NIBRS (Plus) reporting requirements will allow the DOD and the services to collect the "cradle to grave" information necessary to address recurring reporting requirements as well as congressional and constituent inquiries.[29] As the issues faced by the DOD continue to evolve and the demands by policy makers for accurate data rises, the importance of an organized repository of information such as that contemplated by the NIBRS (Plus) and the DIBRS (Complete) also will increase. Given the current progress being made on the new system, the DOD is well on its way to using the DIBRS to track criminals on the information highway. Captain Holly O'Grady Cook, Attorney-Adviser, Office of the Legal Adviser, Department of State and Lieutenant Colonel David F. Shutler, United States Air Force, Deputy Director, Legal Policy Office, Office of the Under Secretary of Defense (Personnel & Readiness).

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[23] DEP'T OF DEFENSE, DD FORM 1569, INCIDENT REPORT (draft).

[24] DEP'T OF DEFENSE, DD FORM 1569-1, COVER FORWARDING DD FORM 1569, "INCIDENT REPORT" TO COMMANDER (draft). Staff agencies listed on the draft DD Form 1569-1 include Family Advocacy, Equal Opportunity, Mental Health, and Drug/Alcohol Abuse.

[25] DEP'T OF DEFENSE, DD FORM 1569-2, COMMANDER'S REPORT ON ACTION TAKEN (draft). Commanders currently report similar information on a Commander's Report of Disciplinary Action. However, that report does not collect sufficient information to comply with NIBRS (Plus). Department of Defense Form 1569-2 will collect all of the required information.

[26] DEP'T OF DEFENSE, DD FORM 1569-3, RESULTS OF TRIAL (draft). A draft list of the data elements which will be reported on the DD Form 1569-3 is located at Appendix B of this note. The DIBRS Working Group is still modifying these elements and developing the final version of the form.

[27] MANUAL FOR COURTS-MARTIAL, United States, R.C.M. 1101 (1984).

[28] DEP'T OF DEFENSE, INSTRUCTION 1030.2, VICTIM AND WITNESS ASSISTANCE PROCEDURES (23 Dec. 1994). Under DOD Instruction 1030.2, the DD Forms 2702, 2703, and 2704 will be used to make required notifications before trial, after trial, and on confinement, respectively. DEP'T OF DEFENSE, DD FORM 2702, COURT-MARTIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Dec. 1994); DEP'T OF DEFENSE, DD FORM 2703, POST-TRIAL INFORMATION FOR VICTIMS AND WITNESSES OF CRIME (Dec. 1994); DEP'T OF DEFENSE, DD FORM 2704, VICTIM/WITNESS CERTIFICATION AND ELECTION CONCERNING INMATE STATUS (Dec. 1994). The DD Form 2704 also will record the victim's election to be notified of changes in the inmate's status. The dates of these notifications will be captured on the DD Form 1569-3.

[29] For example, access to automated information on current issues like prisoner pay, drug abuse, sexual harassment, and homosexual-related actions would greatly assist the DOD as it continues to monitor and respond to inquiries regarding these policies.

Appendix A[30]

Group A Offenses

1. Arson
2. Assault Offenses
   - Aggravated Assault
   - Simple Assault
   - Intimidation
3. Bribery
4. Burglary/Breaking and Entering
5. Counterfeiting/Forgery
6. Destruction/Damage/Vandalism of Property
7. Drug/Narcotic Offenses
   - Drug/Narcotic Violations
   - Drug Equipment Violations
8. Embezzlement
9. Extortion/Blackmail
10. Fraud Offenses
    - False Pretenses/Swindle/Confidence Game
    - Credit Card/Automatic Teller Machine Fraud
    - Impersonation
    - Welfare Fraud
    - Wire Fraud
11. Gambling Offenses
    - Betting/Wagering
    - Operating/Promoting/Assisting Gambling
    - Gambling Equipment Violations
    - Sports Tampering
12. Homicide Offenses
    - Murder and Nonnegligent Manslaughter
    - Negligent Manslaughter
    - Justifiable Homicide
13. Kidnaping/Abduction
14. Larceny/Theft Offenses
    - Pocket-picking
    - Purse-snatching
    - Shoplifting
    - Theft from Building
    - Theft from Coin-Operated Machine or Device
    - Theft from Motor Vehicle
    - Theft of Motor Vehicle Parts or Accessories
    - All other Larceny
15. Motor Vehicle Theft
16. Pornography/Obscene Material
17. Prostitution Offenses
    - Prostitution
    - Assisting or Promoting Prostitution
18. Robbery
19. Sex Offenses, Forcible
    - Forcible Rape
    - Forcible Sodomy
    - Sexual Assault With an Object
    - Forcible Fondling
20. Sex Offenses, Nonforcible
    - Incest
    - Statutory Rape
21. Stolen Property Offenses (Receiving, etc.)
22. Weapon Law Violations

Group B Offenses

1. Bad Checks
2. Curfew/Loitering/Vagrancy Violations
3. Disorderly Conduct
4. Driving Under the Influence
5. Drunkenness
6. Family Offenses, Nonviolent
7. Liquor Law Violations
8. Peeping Tom
9. Runaway
10. Trespass of Real Property
11. All Other Offenses

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[30] Military offenses under the UCMJ will be translated into civilian offenses reported under the NIBRS by a matrix appended to *DOD Manual 7730.47-M*.

Appendix B

RESULTS OF TRIAL
(DD FORM 1569-3 DATA ELEMENTS AND VALUES)

NOTIFICATION UNDER RCM 1101 IS HEREBY GIVEN IN THE SUBJECT CASE

1. NAME (Last, First, Middle Initial)

2. SOCIAL SECURITY NUMBER

3. INCIDENT NUMBER

4. TRIAL BY (X)

   General Court Martial / Special Court Martial / Non-BCD Special / Summary Court Martial

5. LOCATION OF COURT MARTIAL

6. CONVENING ORDER

   Number / Convening Order Date (YYYYMMDD)/ Title of Convening Authority

7. VICTIM/WITNESS INFORMATION

   Court Martial Notification from DD Form 2702 (YYYYMMDD)
   Posttrial Information from DD Form 2703 (YYYYMMDD)
   Certification and Election Concerning Inmate Status from DD Form 2704 (YYYYMMDD)

8. Forum (X)

   Judge Alone / Officer Members / Enlisted Members

9. PRETRIAL AGREEMENT (X)

   YES (If yes, complete block 10) / No

10. TERMS OF AGREEMENT (X)

    Military Judge Only / Forum / Noncapital / Other (Specify)

11. OFFENSE INFORMATION
    Referred Offenses
    Charge Number / UCMJ Article Referred / Description / Specifications/
    Plea (See Note) / Finding (See note)
    Note: If plea or finding modified, list lesser included offenses below.
    Lesser Included Offenses (LIOs)
    LIO Number / LIO Charges / Description / Specifications / Plea / Finding

12. SENTENCE INFORMATION

    Date Adjudged (YYYYMMDD)
    Sentence (X)
    No Punishment / Punishment (Complete blocks 12c through 14) / Death
    Restraints
    Adjudged
    Confinement / Restriction / Hard Labor, No Confinement
    PTA
    Confinement / Restriction / Hard Labor, No Confinement
    Suspended (Yes or No)
    Life (Yes or No)
    Years / Months / Days
    Forfeitures
    Amount / Months
    Total Forfeitures (Yes or No)
    Fines ($)
    Contingent Confinement
    Years / Months / Days
    Reduction
    Type Discharge (DD, BCD, DIS)
    Loss of Numbers
    Reprimand (Yes or No)
    Restitution ($)

13. SENTENCE CREDITS FOR CONFINEMENT

    Pretrial Confinement
    Years / Months / Days
    Judiciary Ordered Credits
    Years / Months / Days
    Total
    Years / Months / Days

14. CONFINEMENT DEFERRED (X)

    Yes (If Yes, give date - YYYYMMDD) / No

15. REMARKS

16. SIGNATURE OF TRIAL COUNSEL

    Name (Last, First, Middle Initial) / Grade / Signature / Date (YYYYMMDD)

Guard and Reserve Affairs Items

Guard and Reserve Affairs Division, OTJAG

LAAWS Bulletin Board

The goal of "Force XXI—America's Army for the 21st century" is to transform the Army away from the Cold War, beyond the Industrial Age to the Information Age. The transformation on the operational level is well underway. Information technology now allows commanders to observe in real time, orient continuously, decide immediately, and act in minutes. "Timely and accurate information has become the single most important commodity of modern warfare."[1]

Timely and accurate legal services are the stock and trade of military lawyers. It is no secret that in today's environment, reserve component (RC) judge advocates are finding it challenging to deliver, along with everything else, timely and accurate military legal services.

To meet the challenge, RC judge advocates must make full use of information technology. Available now to assist is the Legal Automation Army-Wide System Bulletin Board Service (LAAWS BBS). Traditional Air and Army National Guard (ARNG) and Reserve judge advocate personnel, officer and enlisted, now have access to the LAAWS BBS through a toll free number, 800-320-8911. The LAAWS BBS offers far more than access to published materials. It is a conduit for exchange of information and a means of two-way communication with confirmed receipt. You can send private named receiver only messages. The system is flexible and requires only the most inexpensive commercial software. Almost all private law offices already have the software in their present word processing systems. Staff judge advocates can easily use the LAAWS BBS to arrange monthly drill assignments.

The Air Force requires its RC judge advocates to be on their system, and absence of a military-issued computer is not an acceptable excuse. While the Army has yet to make participation on the LAAWS BBS mandatory, competency on the LAAWS BBS is an essential skill.

Army RC judge advocates in the past have justifiably complained about the lack of effective communications. Learning the simple steps to use the LAAWS BBS is the solution. The RC Committee on the LAAWS BBS will soon be managed at Guard and Reserve Affairs. Promotion lists, course information, tour opportunities, a monthly ARNG JA newsletter, and all materials produced at TJAGSA, are now available through LAAWS BBS. Lieutenant Colonel Menk.

[1] DEP'T OF ARMY, ARMY PUB., ARMY FOCUS 1994, FORCE XXI (Sept. 1994).

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School (TJAGSA) is restricted to those students who have a confirmed reservation. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. **If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.**

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through ARPERCEN, ATTN: ARPC-ZJA-P, 9700 Page Boulevard, St. Louis, MO 63132-5200. Army National Guard personnel request reservations through their unit training offices.

When requesting a reservation, you should know the following:

TJAGSA School Code—**181**

Course Name—133d **Contract Attorneys 5F-F10**

Class Number—**133d** Contract Attorneys' Course 5F-F10

To verify you have a confirmed reservation, ask your training office to provide you a screen print of the ATRRS R1 screen showing by-name reservations.

2. TJAGSA CLE Course Schedule

1995

5-9 June: 1st Intelligence Law Workshop (5F-F41).

5-9 June: 130th Senior Officers Legal Orientation Course (5F-F1).

12-16 June: 25th Staff Judge Advocate Course (5F-F52).

19-30 June: JATT Team Training (5F-F57).

19-30 June: JAOAC (Phase II) (5F-F55).

5-7 July: Professional Recruiting Training Seminar.

5-7 July: 26th Methods of Instruction Course (5F-F70).

10-14 July: 6th Legal Administrators Course (7A-550A1).

10 July-15 September: 137th Basic Course (5-27-C20).

17-21 July: 2d JA Warrant Officer Basic Course (7A-550A0).

24-28 July: Fiscal Law Off-Site (Maxwell AFB).

31 July-16 May 1996: 44th Graduate Course (5-27-C22).

31 July-11 August: 135th Contract Attorneys' Course (5F-F10).

1-4 Aug 4MREIN

8-11 August: Military Justice Managers Course (5F-F31).

POLACK

14-18 August: 13th Federal Litigation Course (5F-F29).

JOHNSON

14-18 August: 6th Senior Legal NCO Management Course (512-71D/E/40/50).

21-25 August: 60th Law of War Workshop (5F-F42).

21-25 August: 131st Senior Officers Legal Orientation Course (5F-F1).

28 August-1 September: 22d Operational Law Seminar (5F-F47).

6-8 September: USAREUR Legal Assistance CLE (5F-F23E).

11-15 September: USAREUR Administrative Law CLE (5F-F24E).

11-15 September: 2d Federal Courts and Boards Litigation Course (5F-F14).

18-29 September: 4th Criminal Law Advocacy Course (5F-F34).

3. Civilian Sponsored CLE Courses

August 1995

1-4, GWU: Source Selection Workshop, Seattle, WA.

14-18, GWU: Administration of Government Contracts, San Diego, CA.

21-22, GWU: Subcontract Law in Federal Procurement, Washington, D.C.

25-27, ESI: Contracting for Services, Washington, D.C.

28-1, GWU: Cost-Reimbursement Contracting, Seattle, WA.

29-1, ESI: International Contracting, San Diego, CA.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the March 1995 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama**	31 December annually
Arizona	15 July annually
Arkansas	30 June annually
California*	1 February annually
Colorado	Anytime within three-year period
Delaware	31 July biennially
Florida**	Assigned month triennially
Georgia	31 January annually
Idaho	Admission date triennially
Indiana	31 December annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 June annually
Louisiana**	31 January annually
Michigan	31 March annually
Minnesota	30 August triennially
Mississippi**	1 August annually
Missouri	31 July annually
Montana	1 March annually
Nevada	1 March annually
New Hampshire**	1 August annually
New Mexico	30 days after program
North Carolina**	28 February annually
North Dakota	31 July annually
Ohio*	31 January biennially
Oklahoma**	15 February annually
Oregon	Anniversary of date of birth—new admittees and reinstated members report after an initial one-year period; thereafter triennially
Pennsylvania**	Annually as assigned
Rhode Island	30 June annually

Jurisdiction	Reporting Month
South Carolina**	15 January annually
Tennessee*	1 March annually
Texas	Last day of birth month annually
Utah	31 December biennially
Vermont	15 July biennially
Virginia	30 June annually
Washington	31 January triennially
West Virginia	30 June biennially
Wisconsin*	31 December biennially
Wyoming	30 January annually

For addresses and detailed information, see the July 1994 issue of *The Army Lawyer*.

*Military exempt
**Military must declare exemption

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas. The School receives many requests each year for these materials. Because the distribution of these materials is not in the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). An office may obtain this material in two ways. The first is through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone: commercial (703) 274-7633, DSN 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine-character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD A265755 Government Contract Law Deskbook vol. 1/JA-501-1-93 (499 pgs).

AD A265756 Government Contract Law Deskbook, vol. 2/JA-501-2-93 (481 pgs).

AD A265777 Fiscal Law Course Deskbook/JA-506(93) (471 pgs).

Legal Assistance

AD B092128 USAREUR Legal Assistance Handbook/JAGS-ADA-85-5 (315 pgs).

AD A263082 Real Property Guide—Legal Assistance/JA-261(93) (293 pgs).

AD A281240 Office Directory/JA-267(94) (95 pgs).

AD B164534 Notarial Guide/JA-268(92) (136 pgs).

AD A282033 Preventive Law/JA-276(94) (221 pgs).

AD A266077 Soldiers' and Sailors' Civil Relief Act Guide/JA-260(93) (206 pgs).

AD A266177 Wills Guide/JA-262(93) (464 pgs).

AD A268007 Family Law Guide/JA 263(93) (589 pgs).

AD A280725 Office Administration Guide/JA 271(94) (248 pgs).

AD B156056 Legal Assistance: Living Wills Guide/JA-273-91 (171 pgs).

AD A269073 Model Income Tax Assistance Guide/JA 275-(93) (66 pgs).

AD A283734 Consumer Law Guide/JA 265(94) (613 pgs).

*AD A289411 Tax Information Series/JA 269(95) (134 pgs).

AD A276984 Deployment Guide/JA-272(94) (452 pgs).

AD A275507 Air Force All States Income Tax Guide—January 1994.

Administrative and Civil Law

AD A199644 The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

AD A285724 Federal Tort Claims Act/JA 241(94) (156 pgs).

AD A277440 Environmental Law Deskbook, JA-234-1(93) (492 pgs).

AD A283079 Defensive Federal Litigation/JA-200(94) (841 pgs).

AD A255346 Reports of Survey and Line of Duty Determinations/JA 231-92 (89 pgs).

AD A283503 Government Information Practices/JA-235(94) (321 pgs).

AD A259047 AR 15-6 Investigations/JA-281(92) (45 pgs).

Labor Law

AD A286233 The Law of Federal Employment/JA-210(94) (358 pgs).

AD A273434 The Law of Federal Labor-Management Relations/JA-211(93) (430 pgs).

Developments, Doctrine, and Literature

AD A254610 Military Citation, Fifth Edition/JAGS-DD-92 (18 pgs).

Criminal Law

AD A274406 Crimes and Defenses Deskbook/JA 337(93) (191 pgs).

AD A274541 Unauthorized Absences/JA 301(93) (44 pgs).

AD A274473 Nonjudicial Punishment/JA-330(93) (40 pgs).

AD A274628 Senior Officers Legal Orientation/JA 320(94) (297 pgs).

AD A274407 Trial Counsel and Defense Counsel Handbook/JA 310(93) (390 pgs).

AD A274413 United States Attorney Prosecutions/JA-338(93) (194 pgs).

International and Operational Law

AD A284967 Operational Law Handbook/JA 422(94) (273 pgs).

Reserve Affairs

AD B136361 Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication also is available through DTIC:

AD A145966 USACIDC Pam 195-8, Criminal Investigations, Violation of the U.S.C. in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations and Pamphlets

Obtaining Manuals for Courts-Martial, *DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars.*

(1) The U.S. Army Publications Distribution Center (USAPDC) at Baltimore stocks and distributes DA publications and blank forms that have Army-wide use. Its address is:

Commander
U.S. Army Publications
Distribution Center
2800 Eastern Blvd.
Baltimore, MD 21220-2896

(2) Units must have publications accounts to use any part of the publications distribution system. The following extract from *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program,* paragraph 12-7c (28 February 1989), is provided to assist Active, Reserve, and National Guard units.

The units below are authorized publications accounts with the USAPDC.

(*1*) *Active Army.*

(*a*) *Units organized under a PAC.* A PAC that supports battalion-size units will request a consolidated publications account for the entire battalion except when subordinate units in the battalion are geographically remote. To establish an account, the PAC will forward a DA Form 12-R (Request for Establishment of a Publications Account) and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. The PAC will manage all accounts established for the battalion it supports. (Instructions for the use of DA 12-series forms and a reproducible copy of the forms appear in DA Pam 25-33.)

(b) *Units not organized under a PAC.* Units that are detachment size and above may have a publications account. To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their DCSIM or DOIM, as appropriate, to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(c) *Staff sections of FOAs, MACOMs, installations, and combat divisions.* These staff sections may establish a single account for each major staff element. To establish an account, these units will follow the procedure in (b) above.

(2) *ARNG units that are company size to State adjutants general.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their State adjutants general to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(3) *USAR units that are company size and above and staff sections from division level and above.* To establish an account, these units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and CONUSA to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

(4) *ROTC elements.* To establish an account, ROTC regions will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. Senior and junior ROTC units will submit a DA Form 12-R and supporting DA 12-series forms through their supporting installation, regional headquarters, and TRADOC DCSIM to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896.

Units not described in [the paragraphs] above also may be authorized accounts. To establish accounts, these units must send their requests through their DCSIM or DOIM, as appropriate, to Commander, USAPPC, ATTN: ASQZ-NV, Alexandria, VA 22331-0302.

Specific instructions for establishing initial distribution requirements appear in DA Pam 25-33.

If your unit does not have a copy of *DA Pam 25-33*, you may request one by calling the Baltimore USAPDC at (410) 671-4335.

(3) Units that have established initial distribution requirements will receive copies of new, revised, and changed publications as soon as they are printed.

(4) Units that require publications that are not on their initial distribution list can requisition publications using *DA Form 4569*. All *DA Form 4569* requests will be sent to the Baltimore USAPDC, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

(5) Civilians can obtain DA Pams through the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, Virginia 22161. You may reach this office at (703) 487-4684.

(6) Navy, Air Force, and Marine Corps judge advocates can request up to ten copies of DA Pams by writing to USAPDC, ATTN: DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, MD 21220-2896. You may reach this office at (410) 671-4335.

3. LAAWS Bulletin Board Service

a. The Legal Automation Army-Wide System (LAAWS) operates an electronic bulletin board (BBS) primarily dedicated to serving the Army legal community in providing Army access to the LAAWS BBS, while also providing DOD-wide access. Whether you have Army access or DOD-wide access, all users will be able to download the TJAGSA publications that are available on the LAAWS BBS.

b. Access to the LAAWS BBS:

(1) Army access to the LAAWS BBS is currently restricted to the following individuals (who can sign on by dialing commercial (703) 806-5772, or DSN 656-5772):

(a) Active duty Army judge advocates;

(b) Civilian attorneys employed by the Department of the Army;

(c) Army Reserve and Army National Guard (NG) judge advocates on active duty, or employed by the federal government;

(d) Army Reserve and Army NG judge advocates *not* on active duty (access to OPEN and RESERVE CONF only);

(e) Active, Reserve, or NG Army legal administrators; Active, Reserve, or NG enlisted personnel (MOS 71D/71E);

(f) Civilian legal support staff employed by the Army Judge Advocate General's Corps;

(g) Attorneys (military and civilian) employed by certain supported DOD agencies (e.g. DLA, CHAMPUS, DISA, Headquarters Services Washington);

(h) Individuals with approved, written exceptions to the access policy.

Requests for exceptions to the access policy should be submitted to:

LAAWS Project Office
Attn: LAAWS BBS SYSOPS
9016 Black Rd, Ste 102
Fort Belvoir, VA 22060-6208

(2) DOD-wide access to the LAAWS BBS currently is restricted to the following individuals (who can sign on by dialing commercial (703) 806-5791, or DSN 656-5791):

All DOD personnel dealing with military legal issues.

c. The telecommunications configuration is: 9600/2400/1200 baud; parity-none; 8 bits; 1 stop bit; full duplex; Xon/Xoff supported; VT100/102 or ANSI terminal emulation. After signing on, the system greets the user with an opening menu. Members need only answer the prompts to call up and download desired publications. The system will ask new users to answer several questions and tell them they can use the LAAWS BBS after they receive membership confirmation, which takes approximately twenty-four to forty-eight hours. *The Army Lawyer* will publish information on new publications and materials as they become available through the LAAWS BBS.

d. *Instructions for Downloading Files from the LAAWS BBS.*

(1) Log onto the LAAWS BBS using ENABLE, PROCOMM, or other telecommunications software, and the communications parameters listed in subparagraph c, above.

(2) If you have never downloaded files before, you will need the file decompression utility program that the LAAWS BBS uses to facilitate rapid transfer over the phone lines. This program is known as the PKUNZIP utility. For Army access users, to download it onto your hard drive, take the following actions (DOD-wide access users will have to obtain a copy from their sources) after logging on:

(a) When the system asks, "Main Board Command?" Join a conference by entering [j],

(b) From the Conference Menu, select the Automation Conference by entering [12] and hit the enter key when asked to view other conference members.

(c) Once you have joined the Automation Conference, enter [d] to Download a file off the Automation Conference menu.

(d) When prompted to select a file name, enter [pkz110.exe]. This is the PKUNZIP utility file.

(e) If prompted to select a communications protocol, enter [x] for X-modem protocol.

(f) The system will respond by giving you data such as download time and file size. You should then press the F10 key, which will give you a top-line menu. If you are using ENABLE 3.XX from this menu, select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. The menu will then ask for a file name. Enter [c:\pkz110.exe].

(g) If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option and enter the file name "pkz110.exe" at the prompt.

(h) The LAAWS BBS and your computer will take over from here. Downloading the file takes about fifteen to twenty minutes. ENABLE will display information on the progress of the transfer as it occurs. Once the operation is complete the BBS will display the message "File transfer completed" and information on the file. Your hard drive now will have the compressed version of the decompression program needed to explode files with the ".ZIP" extension.

(i) When the file transfer is complete, enter [a] to Abandon the conference. Then enter [g] for Good-bye to log-off the LAAWS BBS.

(j) To use the decompression program, you will have to decompress, or "explode," the program itself. To accomplish this, boot-up into DOS and enter [pkz110] at the C:\> prompt. The PKUNZIP utility will then execute, converting its files to usable format. When it has completed this process, your hard drive will have the usable, exploded version of the PKUNZIP utility program, as well as all of the compression/decompression utilities used by the LAAWS BBS.

(3) To download a file, after logging onto the LAAWS BBS, take the following steps:

(a) When asked to select a "Main Board Command?" enter [d] to Download a file.

(b) Enter the name of the file you want to download from subparagraph c, below. A listing of available files can be viewed by selecting File Directories from the main menu.

(c) When prompted to select a communications protocol, enter [x] for X-modem (ENABLE) protocol.

(d) After the LAAWS BBS responds with the time and size data, you should press the F10 key, which will give you the ENABLE top-line menu. If you are using ENABLE 3.XX

select [f] for Files, followed by [r] for Receive, followed by [x] for X-modem protocol. If you are using ENABLE 4.0 select the PROTOCOL option and select which protocol you wish to use X-modem-checksum. Next select the RECEIVE option.

(e) When asked to enter a file name enter [c:\xxxxx.yyy] where xxxxx.yyy is the name of the file you wish to download.

(f) The computers take over from here. Once the operation is complete, the BBS will display the message "File transfer completed.." and information on the file. The file you downloaded will have been saved on your hard drive.

(g) After the file transfer is complete, log-off of the LAAWS BBS by entering [g] to say Good-bye.

(4) To use a downloaded file, take the following steps:

(a) If the file was not compressed, you can use it in ENABLE without prior conversion. Select the file as you would any ENABLE word processing file. ENABLE will give you a bottom-line menu containing several other word processing languages. From this menu, select "ASCII." After the document appears, you can process it like any other ENABLE file.

(b) If the file was compressed (having the ".ZIP" extension) you will have to "explode" it before entering the ENABLE program. From the DOS operating system C:\> prompt, enter [pkunzip{space}xxxxx.zip] (where "xxxxx.zip" signifies the name of the file you downloaded from the LAAWS BBS). The PKUNZIP utility will explode the compressed file and make a new file with the same name, but with a new ".DOC" extension. Now enter ENABLE and call up the exploded file "XXXXX.DOC", by following instructions in paragraph (4)(a), above.

e. *TJAGSA Publications Available Through the LAAWS BBS.* The following is a current list of TJAGSA publications available for downloading from the LAAWS BBS (Note that the date UPLOADED is the month and year the file was made available on the BBS; publication date is available within each publication):

FILE NAME	*UPLOADED*	*DESCRIPTION*
RESOURCE.ZIP	June 1994	A Listing of Legal Assistance Resources, June 1994.
ALLSTATE.ZIP	January 1994	1994 AF AllStates Income Tax Guide for use with 1993 state income tax returns, January 1994.
ALAW.ZIP	June 1990	*Army Lawyer/Military Law Review* Database ENABLE 2.15. Updated through the 1989 *Army Lawyer* Index. It includes a menu system and an explanatory memorandum, ARLAWMEM. WPF.
BBS-POL.ZIP	December 1992	Draft of LAAWS BBS operating procedures for TJAGSA policy counsel representative.
BULLETIN.ZIP	January 1994	List of educational television programs maintained in the video information library at TJAGSA of actual classroom instructions presented at the school and video productions, November 1993.
CLG.EXE	December 1992	Consumer Law Guide Excerpts. Documents were created in WordPerfect 5.0 or Harvard Graphics 3.0 and zipped into executable file.
DEPLOY.EXE	December 1992	Deployment Guide Excerpts. Documents were created in Word Perfect 5.0 and zipped into executable file.
FOIAPT1.ZIP	May 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FOIAPT.2.ZIP	June 1994	Freedom of Information Act Guide and Privacy Act Overview, September 1993.
FSO 201.ZIP	October 1992	Update of FSO Automation Program. Download to hard only source disk, unzip to floppy, then A:INSTALLA or B:INSTALLB.
JA200A.ZIP	August 1994	Defensive Federal Litigation—Part A, August 1994.

FILE NAME	UPLOADED	DESCRIPTION
JA200B.ZIP	August 1994	Defensive Federal Litigation—Part B, August 1994.
JA210.ZIP	November 1994	Law of Federal Employment, September 1994.
JA211.ZIP	January 1994	Law of Federal Labor-Management Relations, November 1993.
JA231.ZIP	October 1992	Reports of Survey and Line of Duty Determinations—Programmed Instruction.
JA234-1.ZIP	February 1994	Environmental Law Deskbook, Volume 1, February 1994.
JA235.ZIP	August 1994	Government Information Practices Federal Tort Claims Act, July 1994.
JA241.ZIP	September 1994	Federal Tort Claims Act, August 1994.
JA260.ZIP	March 1994	Soldiers' & Sailors' Civil Relief Act, March 1994.
JA261.ZIP	October 1993	Legal Assistance Real Property Guide, June 1993.
JA262.ZIP	April 1994	Legal Assistance Wills Guide.
JA263.ZIP	August 1993	Family Law Guide, August 1993.
JA265A.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part A, May 1994.
JA265B.ZIP	June 1994	Legal Assistance Consumer Law Guide—Part B, May 1994.
JA267.ZIP	July 1994	Legal Assistance Office Directory, July 1994.
JA268.ZIP	March 1994	Legal Assistance Notarial Guide, March 1994.
JA269.ZIP	January 1994	Federal Tax Information Series, December 1993.
JA271.ZIP	May 1994	Legal Assistance Office Administration Guide, May 1994.
JA272.ZIP	February 1994	Legal Assistance Deployment Guide, February 1994.
JA274.ZIP	March 1992	Uniformed Services Former Spouses' Protection Act—Outline and References.
JA275.ZIP	August 1993	Model Tax Assistance Program.
JA276.ZIP	July 1994	Preventive Law Series, July 1994.
JA281.ZIP	November 1992	15-6 Investigations.
JA285.ZIP	January 1994	Senior Officers Legal Orientation Deskbook, January 1994.
JA290.ZIP	March 1992	SJA Office Manager's Handbook.
JA301.ZIP	January 1994	Unauthorized Absences Programmed Text, August 1993.
JA310.ZIP	October 1993	Trial Counsel and Defense Counsel Handbook, May 1993.
JA320.ZIP	January 1994	Senior Officer's Legal Orientation Text, January 1994.
JA330.ZIP	January 1994	Nonjudicial Punishment Programmed Text, June 1993.
JA337.ZIP	October 1993	Crimes and Defenses Deskbook, July 1993.
JA4221.ZIP	April 1993	Op Law Handbook, Disk 1 of 5, April 1993.
JA4222.ZIP	April 1993	Op Law Handbook, Disk 2 of 5, April 1993.
JA4223.ZIP	April 1993	Op Law Handbook, Disk 3 of 5, April 1993.

FILE NAME	UPLOADED	DESCRIPTION
JA4224.ZIP	April 1993	Op Law Handbook, Disk 4 of 5, April 1993.
JA4225.ZIP	April 1993	Op Law Handbook, Disk 5 of 5, April 1993.
JA501-1.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 1, May 1993.
JA501-2.ZIP	June 1993	TJAGSA Contract Law Deskbook, Volume 2, May 1993.
JA505-11.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 1, July 1994.
JA505-12.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 2, July 1994.
JA505-13.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 3, July 1994.
JA505-14.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume I, Part 4, July 1994.
JA505-21.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 1, July 1994.
JA505-22.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 2, July 1994.
JA505-23.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 3, July 1994.
JA505-24.ZIP	July 1994	Contract Attorneys' Course Deskbook, Volume II, Part 4, July 1994.
JA506-1.ZIP	November 1994	Fiscal Law Course Deskbook, Part 1, October 1994.
JA506-2.ZIP	November 1994	Fiscal Law Course Deskbook, Part 2, October 1994.
JA506-3.ZIP	November 1994	Fiscal Law Course Deskbook, Part 3, October 1994.
JA508-1.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 1, 1994.
JA508-2.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 2, 1994.
JA508-3.ZIP	April 1994	Government Materiel Acquisition Course Deskbook, Part 3, 1994.
1JA509-1.ZIP	November 1994	Federal Court and Board Litigation Course, Part 1, 1994.
1JA509-2.ZIP	November 1994	Federal Court and Board Litigation Course, Part 2, 1994.
1JA509-3.ZIP	November 1994	Federal Court and Board Litigation Course, Part 3, 1994.
1JA509-4.ZIP	November 1994	Federal Court and Board Litigation Course, Part 4, 1994.
JA509-1.ZIP	February 1994	Contract, Claims, Litigation and Remedies Course Deskbook, Part 1, 1993.
JA509-2.ZIP	February 1994	Contract Claims, Litigation, and Remedies Course Deskbook, Part 2, 1993.
JAGSCHL.WPF	March 1992	JAG School report to DSAT.
YIR93-1.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 1, 1994 Symposium.
YIR93-2.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 2, 1994 Symposium.
YIR93-3.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 3, 1994 Symposium.
YIR93-4.ZIP	January 1994	Contract Law Division 1993 Year in Review, Part 4, 1994 Symposium.
YIR93.ZIP	January 1994	Contract Law Division 1993 Year in Review text, 1994 Symposium.

f. Reserve and National Guard organizations without organic computer telecommunications capabilities, and individual mobilization augmentees (IMA) having bona fide military needs for these publications, may request computer diskettes containing the publications listed above from the appropriate proponent academic division (Administrative and Civil Law, Criminal Law, Contract Law, International and Operational Law, or Developments, Doctrine, and Literature) at The Judge Advocate General's School, Charlottesville, Virginia 22903-1781. Requests must be accompanied by one 5 1/4-inch or 3 1/2-inch blank, formatted diskette for each file. In addition, requests from IMAs must contain a statement which verifies that they need the requested publications for purposes related to their military practice of law.

g. Questions or suggestions on the availability of TJAGSA publications on the LAAWS BBS should be sent to The Judge Advocate General's School, Literature and Publications Office, ATTN: JAGS-DDL, Charlottesville, VA 22903-1781. For additional information concerning the LAAWS BBS, contact the System Operator, SGT Kevin Proctor, Commercial (703) 806-5764, DSN 656-5764, or at the address in paragraph b(1)(h), above.

4. TJAGSA Information Management Items

a. Each member of the staff and faculty at The Judge Advocate General's School (TJAGSA) has access to the Defense Data Network (DDN) for electronic mail (e-mail). To pass information to someone at TJAGSA, or to obtain an e-mail address for someone at TJAGSA, a DDN user should send an e-mail message to:

"postmaster@jags2.jag.virginia.edu"

b. Personnel desiring to reach someone at TJAGSA via DSN should dial 934-7115 to get the TJAGSA receptionist, then ask for the extension of the office you wish to reach.

c. The Judge Advocate General's School also has a toll-free telephone number. To call TJAGSA, dial 1-800-552-3978.

5. Articles

The following information may be of use to judge advocates in performing their duties:

Daniel L. Rotenberg, *On Seizures and Searches*, 28 CREIGHTON L. REV. 323 (1995).

Jan Elliott Pritchett, Minnesota v. Dickerson: *"Plain Feel"—Does a Police Officer Have the Right to Seize Contraband Other than Weapons when Performing a Terry "Stop and Frisk?"*, 20 S.U. L. REV. 495 (1993).

Christopher R. Rossi, Jus Ad Bellum *In the Shadow of the 20th Century*, 15 N.Y.L. SCH. J. INT'L & COMP. L. 49 (1994).

Robbyn Reichman-Coad, *Human Rights Violations in China: A United States Response*, 15 N.Y.L. SCH J. INT'L & COMP. L. 163 (1994).

Jullie Ann Waterman, *The United States Involvement in Haiti's Tragedy and the Resolve to Restore Democracy*, 15 N.Y.L. SCH J. INT'L L. 187 (1994).

Andrew M. Ferris, *Military Justice: Removing the Probability of Unfairness*, 63 U. CIN. L. REV. 439 (1994).

Ruth C. Vance, *Workers' Compensation and Sexual Harassment in the Workplace: A Remedy for Employees, or a Shield for Employers?*, 44 DEF. L.J. 1 (1995).

Jeffrey M. Sanders, *Kentucky Adopts Risk Assessment for Closing Hazardous Waste Units*, 22 N. KY. L.J. 37 (1995).

Samuel L. Perkins, *Petroleum Storage Regulation in Kentucky*, 22 N. KY. L.J. 59 (1995).

Paul T. Lawless, Note, City of Chicago v. Environmental Defense Fund: *Justice Scalia's Evolution of the Plain Meaning Approach as Applied to RCRA's Household Exemption*, 22 N. KY. L.J. 115 (1995).

Troy A. Borne, Note, PUD No. 1 of Jefferson County v. Washington Department of Ecology: *Expanding State Authority to Determine Clean Water Act Certification Standards*, 22 N. KY. L.J. 139 (1995).

Karen L. DeMeo, Note, *Is CERCLA Working, An Analysis of the Settlement and Contribution Provisions*, 68 ST. JOHN'S L. REV. 493 (1994)

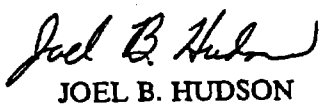
6. The Army Law Library Service

With the closure and realignment of many Army installations, the Army Law Library System (ALLS) has become the point of contact for redistribution of materials contained in law libraries on those installations. *The Army Lawyer* will continue to publish lists of law library materials made available as a result of base closures. Law librarians having resources available for redistribution should contact Ms. Helena Daidone, JAGS-DDS, The Judge Advocate General's School, United States Army, Charlottesville, Virginia 22903-1781. Telephone numbers are DSN: 934-7115, ext. 394, commercial: (804) 972-6394, or facsimile: (804) 972-6386.

By Order of the Secretary of the Army:

GORDON R. SULLIVAN
General, United States Army
Chief of Staff

Official:



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